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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 304

THE PEOPLE OF THE STATE OF NEW YORK, PETITIONERS,

vs.

IRVING TRUST COMPANY, AS TRUSTEE IN BANKRUPTCY OF EXPERIMENTER PUBLISHING CO., INC., BANKRUPT

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 17, 1932

CERTIORARI GRANTED OCTOBER 17, 1932

(37,001)

(37,001)

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INDEX

	Original	Print
Proceedings in United States circuit court of appeals, second circuit	1	1
Statement	1	1
Record from district court of the United States, Southern New York	3	2
Order of the district judge appealed from	3	2
Order and judgment of referee appealed from	5	3
Assignment of errors	8	5
Order limiting time to file claims	14	8
Petition of trustee on which order limiting time to file claims was made	16	9
Claim A of State of New York	18	10
Claim B of State of New York	19	11
Trustee's notice of motion to expunge claims	21	11

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[fols. a & 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

46582

In the Matter of EXPERIMENTER PUBLISHING CO., INC., Bankrupt; THE PEOPLE OF THE STATE OF NEW YORK, Appellant; IRVING TRUST COMPANY, as Trustee in Bankruptcy, Appellee

STATEMENT

The Experimenter Publishing Co., Inc., was adjudicated bankrupt March 6th, 1929. Irving Trust Company has been duly appointed trustee.

On July 1st, 1929, an order was made by the District Court of the United States for the Southern District of New York requiring the People of the State of New York to file any claim for taxes which it might have against the bankrupt within sixty days after service of a copy of the said order. Said order, with notice of entry was duly served July 18th, 1929.

On March 29th, 1929, the State of New York filed with the referee in bankruptcy a notice of an unliquidated claim printed herein as "Claim A."

[fol. 2] On October 20th, 1929, the State of New York filed a further notice of an unliquidated claim printed herein as "Claim B."

On or about March 30th, 1931, the trustee moved before the referee to expunge the claims of the State as filed. The referee granted the motion to expunge as to the certain notice of an unliquidated claim for taxes dated October 17th, 1929, and filed October 20th, 1929, and an order and judgment of the referee accordingly was made and entered September 2nd, 1931.

The People of the State of New York then petitioned for a review of the order and judgment of the referee and prayed for a modification thereof by denying the application of the trustee to expunge the notice of unliquidated claim filed October 20th, 1929.

The review came on before Hon. Frank J. Coleman, D. J. and the order and judgment of the referee was in all respects affirmed.

The People of the State of New York thereupon took and perfected the appeal herein.

The People of the State of New York appeared in the proceedings below and now appear by John J. Bennett, Jr., Esq., Attorney General of the State of New York.

The trustee appeared in the proceedings below and now appears by S. John Block, Esq. and Root, Clark, Buckner, Howland & Ballantine.

Final distribution of the estate of the bankrupt has not as yet taken place.

[fol. 3] In United States District Court, Southern New York

Present: Hon. Frank J. Coleman, District Judge.

In the Matter of Experimenter Publishing Co., Inc., Bankrupt

Order Appealed From—Dec. 4, 1931

A petition, verified September 17, 1931, having been filed herein on September 18, 1931, by the Department of Taxation and Finance of the State of New York, to review the order of Hon. Peter B. Olney, Jr., Referee in Bankruptcy herein, dated September 2, 1931, denying a motion by Irving Trust Company, the Trustee herein, to expunge a notice of unliquidated claim of the State of New York for taxes dated March 29, 1929, and granting said motion as to a notice of unliquidated claim of the State of New York for taxes dated October 17, 1929, and expunging said last-mentioned notice.

Now, upon reading the notice of said motion, dated March 30, 1931, the affidavit of Robert L. Smith, verified March 30, 1931, the said notices of claim dated March 29, [fol. 4] 1929, and October 17, 1929, respectively, the tax bar order, dated July 1, 1929, copies of which said notices of claim and tax bar order are annexed to said affidavit of Robert L. Smith, the testimony taken before said Referee on behalf of the State of New York, and the exhibits re-

ceived in evidence on behalf of the State of New York, in opposition to said motion, the two orders of Hon. Peter B. Olney, Jr., Referee, each dated April 10, 1929, confirming the sale of the assets of the bankrupt and the papers on which said orders were made, consisting of the petition of Irving Trust Company, verified April 10, 1929, and the two exhibits annexed to said petition, the schedule of the Referee, Hon. Peter B. Olney, Jr., of claims filed herein, dated September 20, 1929; the opinion of the said Referee, dated August 20, 1931, and the order of the said Referee, dated September 2, 1931; the petition, verified September 17, 1931, to review said order and the notice of motion, dated September 25, 1931, and returnable before this Court September 30, 1931.

And after hearing John J. Bennett, Jr., Attorney General of the State of New York (Anthony P. Ludden of counsel) in support of said petition to review, and S. John Block, one of the attorneys for Irving Trust Company, the Trustee herein, in opposition to said petition, and after due deliberation and upon filing the opinion of this Court, dated November 10, 1931, it is

Ordered that the said order of Hon. Peter B. Olney, Jr., Referee herein, dated September 2, 1931, be and it hereby [fol. 5] is in all respects affirmed, and it is further

Ordered that the said petition to review filed herein on September 18, 1931, be and the same is hereby dismissed.

Frank J. Coleman, D. J.

In United States District Court

Present: Honorable Peter B. Olney, Jr., Referee.

[Title omitted]

Order and Judgment of the Referee—Sept. 2, 1931

Irving Trust Company, the Trustee of the above-named bankrupt, having made a motion for an order striking from the files of the Referee in Bankruptcy in the above-entitled [fol. 6] matter two certain notices each entitled "Notices of unliquidated claim of State of New York for taxes" dated March 29, 1929, and October 17, 1929, respectively

and cancelling and expunging said notices and directing the said Trustee herein to disregard said notices or any claims filed in support thereof and for such other, further or different relief as the Court should deem just and proper,

Now, upon reading and filing the notice of said motion dated the 30th day of March, 1931, and returnable before me on the 9th day of April, 1931, at 3:30 o'clock in the afternoon, the affidavit of Robert L. Smith verified the 30th day of March, 1931, and copies of said notices marked respectively "Exhibit A" and "Exhibit B" annexed to said affidavit and notice of motion, and a copy of the tax bar order herein dated July 1, 1929, annexed to said affidavit and notice of motion and marked "Exhibit C", and upon reading the originals of said two notices and of said tax bar order which are on file in the office of the Referee in Bankruptcy in this matter, all in support of said motion, and testimony having been duly taken on behalf of the State of New York in opposition to said motion and upon reading and filing said testimony and said motion having been duly argued before me on the aforementioned return date thereof and on subsequent dates to which the argument of said motion was duly adjourned, and after hearing S. John Block, one of the attorneys for the Irving Trust Company, Trustee of the above-named bankrupt, in sup- [fol. 7] port of said motion and John J. Bennett, Jr., Attorney General of the State of New York (Anthony P. Ludden of counsel) in opposition to said motion, and after due deliberation and upon filing the opinion dated August 20, 1931, of the Referee upon said motion, it is

Ordered that said motion be and it hereby is denied as to the certain notice of an unliquidated claim of the State of New York for taxes dated March 29, 1929, and filed in the office of the Referee in Bankruptcy herein, which said last mentioned notice relates to an unliquidated claim for franchise taxes against the above-named bankrupt for the tax years beginning November 1, 1928, together with interest, and that said motion be and it hereby is granted as to the certain notice of an unliquidated claim of the State of New York for taxes dated October 17, 1929, and filed in the office of the Referee in Bankruptcy herein, which said last mentioned notice relates to an unliquidated claim for franchise taxes against the above-named bankrupt for the tax years

beginning November 1, 1928, and to an unliquidated claim for additional franchise taxes as imposed by Section 219 d, Article 9 of the Tax Law of the State of New York, for the tax years beginning November 1, 1917, to 1928, inclusive, together with interest and that said last mentioned notice hereby is cancelled and expunged, and the said Trustee of the above-named bankrupt is hereby directed to disregard [fol. 8] said last mentioned notice and any claims filed in support thereof.

Peter B. Olney, Jr., Referee in Bankruptcy.

IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS

Now comes the claimant, The People of the State of New York, by John J. Bennett, Jr., their solicitor and Attorney-General of the State of New York, and in connection with their petition for appeal say that in the record of proceedings and in the order made therein, dated the 4th day of De- [fol. 9] cember, 1931 and entered in the office of the Clerk of this Court on the 9th day of December, 1931, manifest error hath intervened to the prejudice of said claimant-appellant, as follows:

First. That the Court erred in confirming the order of the Referee, Hon. Peter B. Olney, Jr., dated September 2, 1931, cancelling and expunging a claim of the State of New York for an unliquidated franchise tax liability for the tax year beginning November 1, 1928, and in cancelling and expunging an unliquidated claim for additional franchise taxes, as imposed by §219-d of the Tax Law of the State of New York for the tax years beginning November, 1917 to November, 1928, inclusive, together with interest, said expunging and cancelling of said claims being made by the Court and the Referee herein upon the ground and for the sole reason that said claims were filed one month and twenty days after the expiration of the time limited for filing of said claims in a bar order made by this Court on the first day of July, 1929, whereas, in law and in fact, at the time of the filing of said claims no final distribution of the estate of said bankrupt

had been made; that there was more than sufficient assets remaining undistributed to take care and provide for the payment of said claims in full; that the legal effect of the bar order of this Court was limited solely to preventing the State of New York from filing any additional claims after the period of distribution of the bankrupt's estate; that it was the duty of the Referee in bankruptcy herein to receive and file any claim of the State of New York prior to the time of [fol. 10] actual distribution of the bankrupt's estate; that the claims of the State of New York, cancelled and expunged herein, were duly filed with the Referee in Bankruptcy herein prior to the time of distribution of the bankrupt's estate, and that upon the filing of said claim it became the duty of the Referee in bankruptcy herein to audit and adjust the franchise taxes of the State of New York due from the bankrupt herein for the tax years for which said claims were filed, in accordance with the net income of the said bankrupt as returned to the United States Treasury Department and as changed or corrected by the Commissioner of Internal Revenue or other officer of the United States or other competent authority, and that, if it should be determined by the Referee in bankruptcy that additional net income for the tax years in question was taxable as aforesaid, that the amount of additional franchise taxes due by the bankrupt to the State of New York for the tax years in question be settled and determined, and the amount thereof, with interest at the rate of six per cent per annum from the respective due dates thereof to the date of payment, be allowed as a preferred claim due to the State of New York and directed to be paid as such.

Second. The Court erred in holding that the effect of the filing of the claims of the State of New York, which were expunged and cancelled herein, was to delay distribution of the bankrupt's estate and hence should be cancelled and expunged because filed after the time limited in the bar order [fol. 11] of July 1, 1929, and whereas, in law and in fact, upon the filing of said claims, it became the duty of the Referee in Bankruptcy herein to audit, state and correct the true amount of the net income of the bankrupt corporation for the tax years for which said claims were filed, and to take and state the true account and liability of said bankrupt's corporation for taxes both to the United States Government and to the State of New York. That such determination

could be made expeditiously by the Referee in bankruptcy herein, and that no unnecessary delay has been occasioned in the final making of distribution herein because of the fact that the claim of the State of New York for such additional franchise taxes was filed herein one month and twenty days after the expiration period in the bar order of July 1, 1929.

Third. That the Court erred in expunging the claims of the State of New York hereinbefore specified in the Assignment of Errors because of the fact that the same were filed one month and twenty days after date of expiration in the bar order of July 1, 1929; because of the fact that the District Court had no authority or power by any bar order to effect or limit the taxing power either of the State of New York or of the United States Government, or to limit or effect the collection of any taxes lawfully due and owing by the bankrupt to either the State of New York or the United States Government. The power of the District Court of the United States to limit the filing of claims before final judicial [fol. 12] distribution of the bankrupt's property was limited in scope merely to private individuals, firms and corporations, and did not extend to State sovereignties or to the sovereignty of the government of the United States; that if, in truth and in fact, there were any addtional taxes due by the bankrupt to the State of New York under §219-d of the Tax Law of the State of New York, it was the duty of the trustee and of the Referee to inquire and ascertain the existence of any liability for such taxes and to have said liability stated and determined and paid.

Wherefore the claimant-appellant prays that the order of the United States District Court for the Southern District of New York, dated the 4th day of December, 1931, and entered in the office of the Clerk of this Court on the 9th day of December, 1931, confirming the above-mentioned order and judgment of the Referee, dated September 2, 1931, be reversed for the errors aforesaid and for the other errors in the record and proceedings aforesaid, and that the said order by the said Referee, dated September 2, 1931, insofar as the same expunges a notice of unliquidated claim of the State of New York for taxes dated October 17, 1929, be reversed; that the motion of the Trustee in bankruptcy herein to expunge said notice of unliquidated claim be

denied; that the Referee in bankruptcy herein be directed to ascertain the correct amount of net income of the bankrupt herein for the tax years for which said unliquidated claim of the State of New York was filed and, in accordance [fol. 13] with the income thus ascertained, ascertain and state the amount of additional franchise taxes, if any, due to the State of New York pursuant to §219-d of the Tax Law of the State of New York for the tax years for which said unliquidated claim was filed, and that the amount thereof thus ascertained, with interest at the rate of six per cent per annum from the date when said additional taxes became due and payable to date of payment, be allowed to the claimant, The People of the State of New York, as a preferred claim and directed to be paid as such.

Wherefore the claimant, The People of the State of New York, prays for such other and further relief as to the Court may seem just and proper.

Dated New York, Dec. 15, 1931.

John J. Bennett, Jr., Attorney-General of the State of New York, Solicitor for Appellant. Office & P. O. address: Capitol, Albany, New York.

[fol. 14] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER LIMITING TIME TO FILE CLAIMS

Upon reading and filing the annexed petition of Irving Trust Company, verified the 29th day of June, 1929, upon the involuntary petition in bankruptcy filed herein, upon the order of adjudication entered herein, and upon all papers filed and proceedings heretofore had herein, it is, on motion of Root, Clark, Buckner, Howland & Ballantine, and S. John Block, attorneys for the Trustee herein,

Ordered that the State of New York, through its Department of Taxation and Finance, be and it hereby is required to file in the office of Honorable Peter B. Olney, Jr., Referee in Bankruptcy, at No. 7 Dey Street, in the Borough of Manhattan, City of New York, within sixty days after the service of a copy of this order, with notice of entry thereof, proof

of any and all claims which the State of New York may have against the estate of the above-named bankrupt; and it is further

Ordered that upon failure of the State of New York to file such a claim within the time hereinabove specified, the [fol. 15] State of New York be and it hereby is forever barred from asserting any claim against the estate of the above-named bankrupt, or against the Trustee herein or against the funds in the hands of the Trustee; and it is further

Ordered that a copy of this order and the petition upon which the same is granted, with notice of the entry of said order, be served upon Maurice A. Stephenson, Deputy Commissioner in charge of New York City Office of the State Tax Commission, and upon Charles A. Curtin, Attorney for the State Tax Commission of the State of New York, and that proof of due service thereof be filed with the Referee herein.

Dated New York, N. Y., July 1, 1929.

Peter B. Olney, Jr., Referee in Bankruptcy.

[fol. 16] In United States District Court

[Title omitted]

Petition of Trustee Upon Which Order Limiting Time to File Claims Was Made

To Honorable Peter B. Olney, Jr., Referee in Bankruptcy:

The petition of Irving Trust Company respectfully shows:

1. That it is the duly qualified and acting Trustee of the above-named bankrupt.

2. That payment of a dividend of 25% was ordered on June 10, 1929, in this matter and that further dividends will be declared in the near future.

3. The State of New York has not as yet filed any claim for income taxes or other taxes and your petitioner has no way of determining the amount of such claim, if any, unless the State shall file such claim.

4. Unless all priority claims shall be determined within the near future the liquidation of the estate and payment

of further dividends to the general creditors will be materially delayed.

[fol. 17] 5. Your petitioner will be liable for the payment of the priority claims if the general creditors are paid without such priority claims having been determined.

Wherefore your petitioner prays that an order be made and entered herein directing that the State of New York, through its Deputy Commissioner, file a proof of claim within a definite time to be specified by this Court, otherwise and in default of filing such a claim the State of New York be forever barred and foreclosed from participation in the assets of this estate.

No previous application for this order has been made to any court or judge.

Dated New York, New York, June 29, 1929.

Irving Trust Company, by G. Gardner, Assistant Vice-President.

Duly sworn to by Gustav Gardner. Jurat omitted in printing.

[fol. 18] In United States District Court

[Title omitted]

Claim A of State of New York

Please take notice that the State of New York has an unliquidated claim for franchise taxes against the above named bankrupt for the tax years beginning November 1, 1928, together with interest, the exact amount of such taxes and interests being unknown at the date hereof. Claim will be filed as soon as the necessary franchise reports can be obtained or such other information as may be necessary to [fol. 19] fix and determine such tax or taxes.

Please take notice that annexed hereto is a Notice of Unliquidated Claim for Franchise Taxes due the State of New York and for which the State of New York claims a preference over and above all the debts of the said bankrupt and claims submitted to you.

Dated 3/29/29.

Hamilton Ward, Attorney General of the State of New York. Office and Post Office address: Albany, N. Y.

In United States District Court

[Title omitted]

Claim B of State of New York—Filed Oct. 20, 1929

Please take notice that the State of New York has an unliquidated claim for franchise taxes against the above named bankrupt for the tax years beginning November 1, 1928, also additional franchise taxes as imposed by Section [fol. 20] 219d, Article 9a, of the Tax Law for tax years beginning November 1, 1917, to 1928, inclusive together with interest, the exact amount of such taxes and interests being unknown at the date hereof. Claim will be filed as soon as the necessary franchise reports can be obtained or such other information as may be necessary to fix and determine such tax or taxes.

Please take notice that annexed hereto is a Notice of Unliquidated Claim for Franchise Taxes due the State of New York and for which the State of New York claims a preference over and above all the debts of the said bankrupt and claims submitted to you.

Dated 10/17/29.

Hamilton Ward, Attorney General of the State of New York. Office and Post Office: ——.

[File endorsement omitted.]

[fol. 21] In United States District Court

[Title omitted]

Trustee's Notice of Motion to Expunge Claims

Sir: Please take notice that upon the annexed affidavit of Robert L. Smith, verified the 30th day of March, 1931, a motion will be made before Hon. Peter B. Olney, Jr., Referee in Bankruptcy herein, at his office, No. 7 Dey Street, in the Borough of Manhattan, City of New York, on the 9th day of April, 1931, at 3:30 o'clock in the afternoon or as soon thereafter as counsel can be heard, for an order striking from the said Referee's file herein two certain no-

tices each entitled "Notice of Unliquidated Claim of State of New York for Taxes," dated March 29th, 1929, and October 17, 1929, respectively, and heretofore filed herein, copies of which notices are annexed hereto and are marked "Exhibit A" and "Exhibit B", respectively, and cancelling and expunging said notices and directing the Trustee herein to disregard said notices or any claims filed in support thereof and for such other, further or different relief as the Court may deem just and proper.

[fol. 22] Dated New York, March 30th, 1931.

Yours, etc., S. John Block and Root, Clark, Buckner and Ballantine, Attorneys for Irving Trust Company, Trustee, 225 Broadway, New York, N. Y.

To Hon. John J. Bennett, Jr., Attorney General of the State of New York, Albany, New York.

IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF ROBERT L. SMITH, READ IN SUPPORT OF MOTION TO EXPUNGE CLAIMS

STATE OF NEW YORK,
City of New York,
County of New York, ss:

Robert L. Smith, being duly sworn, deposes and says:

[fol. 23] I am an Assistant Vice-President of Irving Trust Company, Trustee in Bankruptcy of the above-named estate.

There are now on file in the office of Honorable Peter B. Olney, Jr., Referee in Bankruptcy herein, a claim and two notices of unliquidated claims of the State of New York for taxes due from the bankrupt. The claim, filed on March 29, 1929, is for unpaid franchise taxes amounting to $1,372.37. Said claim has been objected to and is awaiting determination. It is not in any way involved in this motion. At the same time there was filed a "Notice of Unliquidated Claim of State of New York for Taxes," dated March 29, 1929, a copy of which notice is annexed hereto and made part hereof and marked "Exhibit A."

On October 20, 1929, a further "Notice of Unliquidated Claim of the State of New York for Taxes" was filed, which notice set forth an intention to file a claim for the same tax described in the notice of March 29, 1929, and also stated an additional claim for additional franchise taxes for tax years beginning November 1, 1917, to 1928, inclusive. A true copy of said second notice is annexed hereto and made part hereof and marked "Exhibit B."

Experimenter Publishing Co., Inc., was adjudged bankrupt on March 6, 1929. The period within which claims [fol. 24] could have been filed expired on September 6, 1929. The second notice herein was filed after the expiration of the six months within which claims could be filed.

On July 18, 1929, copies of a Tax Bar Order herein dated July 1, 1929, with notice of entry thereof and copies of a petition herein, dated June 29, 1929, upon which said order was made, were duly served upon Charles A. Curtin, Attorney for the New York State Tax Commission, and upon Maurice A. Stephenson, Deputy Commissioner, New York State Tax Commission, requiring the State of New York through its Department of Taxation and Finance, to file in the office of Honorable Peter B. Olney, Jr., Referee in Bankruptcy, within 60 days after the service of a copy of said order with notice of entry, proof of any and all claims which the State of New York may have against the estate of the above named bankrupt and further ordering that upon the failure of the State of New York to file such a claim within the time specified, the State of New York be forever barred from asserting any claim against the estate of the above named bankrupt or against the Trustee herein or against the funds in the hands of the Trustee. Said 60 day period expired on September 16, 1929. The second notice was therefore filed more than one month after the expiration of the 60 day period allowed by the tax bar order. Annexed hereto and made part hereof and marked respectively "Exhibit C" and "Exhibit D" are [fol. 25] true copies of the said Tax Bar Order and of the said petition upon which said order was duly made herein by the Referee herein on July 1, 1929.

It should be noted that in this case the sixty day period provided by the Tax Bar Order expired subsequent to the expiration of the six months' period within which claims should have been filed. No proof of any claim of the State

of New York has been filed herein, either within either of said periods or at any other time except the said claim for $1,372.37.

Since the filing of said "Notices of Unliquidated Claim" the State has never filed a proof of claim in support of said notices nor has it taken any step to indicate to the Trustee the exact amount of the alleged liability, if any, of the bankrupt for taxes to the State. The Trustee is in ignorance of the amount of the claim, if any, of the State of New York for alleged unpaid taxes. The State itself does not know the amount of its claim, if any. At the time the State Tax Commission filed the second notice of claim, it addressed a letter, dated October 18, 1929, to Hon. Peter B. Olney, Jr., Referee in Bankruptcy herein, enclosing the said second notice and stating: "These latter assessments (for the tax years beginning November 1, 1917, to 1928) have not as yet been computed, owing to the failure of the bankrupt to supply the necessary information as the statute directs". The Trustee, itself, is unable to give the [fol. 26] State Tax Commission any information regarding the business transactions of the bankrupt prior to the adjudication of March 6, 1929, for the reason that all the properties of the bankrupt, including all its books of account, records, tax returns and balance sheets were sold to Experimenter Publications, Inc., by order of this Court, dated April 10, 1929. Pursuant to said order all of said books and records have been delivered to said purchaser and said books and records are no longer in the control or possession of the Trustee and have not been in the Trustee's control or possession since the State Tax Commission has indicated that it wants information to recompute the assessments for the tax years beginning November 1, 1917 to 1928, inclusive. The Trustee herein has no information whatsoever to give to the State Tax Commission to enable it to compute assessments due, if any.

The notices themselves state that the exact amount of such taxes and interest are not known by the State and that the claim will be filed if and when the necessary franchise reports can be obtained or such other information as may be necessary to fix and determine such tax or taxes. By its own admission the State has not the necessary information to file a claim. As has already been stated, the Trustee is not able to furnish the necessary in-

formation. With all avenues of information closed, the State has sat by idly and delayed the prompt administration of the estate.

[fol. 27] The State is not in the position of a sovereign whose attempts to fix and collect taxes are being opposed and frustrated by one who hopes to evade and escape liability therefor. Taxes have already been computed for the tax years 1917 to 1927, inclusive, and deponent believes that all of said taxes have been paid with the possible exception of the taxes set forth in the claim for $1,372.37. The State is now attempting to recompute and redetermine the franchise taxes. For fourteen years (since 1917) the State could have taken steps to determine if its original computation of tax was incorrect. Instead of doing that while the bankrupt corporation was doing business and was solvent, the State took its one and only step after bankruptcy and after the books of the bankrupt had been sold by order of the Court. The State had notice of the proposed sale. It filed a claim on March 29th, 1929; the sale was approved at a creditors' meeting on April 10, 1929. If the State had been diligent it could have appeared at the creditors' meeting and objected to the sale of the books or it could have insisted that the right of inspection of the books be reserved under the contract of sale. It failed to take any of these steps.

The presence of said "Notices of Unliquidated Claim" in the files of this proceeding prevents the Trustee from administering the estate and distributing the money in its possession. The Trustee has refrained for one year and [fol. 28] four months from taking any action to strike said notices from the files herein. During all of said period of time it has been compelled to keep a cash reserve of approximately $40,000, which otherwise would have been distributed herein. So long as said notices are permitted to remain as part of the record in this matter the Trustee cannot dispose of said fund or close the estate. The Referee cannot allow the claim if any, of the State of New York for no claim has been presented and for the same reason he cannot disallow it.

Said "Notices of Unliquidated Claim" do not comply with the Bankruptcy Act in any way. There is no provision in the act permitting the filing of such a paper, nor is

the filing in accordance with the practice in bankruptcy proceedings. The filing of claims is governed by the provisions of Section 57 of the Bankruptcy Act which reads as follows:

"Section 57. Proof and Allowance of Claims.—a. Proof of claims shall consist of a statement under oath, in writing, signed by a creditor setting forth the claim, the consideration therefor, and whether any, and, if so what, securities are held therefor, and whether any, and, if so what, payments have been made thereon, and that the sum claimed is justly owing from the bankrupt to the creditor."

The act makes no provision for filing of notices of claim. It is very explicit in providing for the filing of proofs of [fol. 29] claim only. The filing of the notice was in no way a compliance with the act and it is therefore a nullity. The trustee should not be compelled to delay the closing of a bankrupt estate by proceedings taken by a creditor not in accordance with the Bankruptcy Act.

By its own notice the State of New York has now attempted to collect additional franchise taxes for the tax years beginning November 1, 1917 to 1928. In other words, the State of New York is now delaying the closing of this estate because of its inability to compute correctly the franchise taxes due it for the tax years beginning November 1, 1917 to 1928. It has already imposed franchise taxes for the years 1917 to 1927, inclusive, and it is now attempting to force the Trustee to re-audit the accounts and books of the bankrupt for the ten years preceding the bankruptcy so that the State can determine if there is any further tax due it. It is quite evident that we have here nothing more or less than a fishing excursion. The State having no positive knowledge that any additional franchise taxes are due has put in a notice of an unliquidated claim which it has failed to follow up by formal proof, has demanded that the Trustee supply it with audits for the years 1917 to 1928 so that it may compute the additional franchise taxes due, if any, and because of its inability by itself to determine if any additional franchise taxes are due it is delaying the [fol. 30] closing of this estate and preventing the distribution of the money which the Trustee is forced to hold as a reserve until this matter is finally determined.

Wherefore your deponent prays for an order striking from the Referee's file herein the aforementioned two certain notices each entitled "Notice of Unliquidated Claim of the State of New York for Taxes", dated March 29, 1929, and October 17, 1929, respectively, and cancelling and expunging said notices and directing the Trustee herein to disregard said notices or any claims filed in support thereof and for such other, further or different relief as the Court may deem just and proper.

Robert L. Smith.

Sworn to before me this 30th day of March, 1931. Robert Halpern, Commissioner of Deeds, N. Y. City. Kings Co. Cl'k's No. 50, Reg. No. 1047. N. Y. Co. Clk's No. 151, Reg. No. 56H1. Commission expires June 11, 1931.

(The exhibits attached to this affidavit are as heretofore printed.)

[fol. 31] In United States District Court, Southern District of New York

In Bankruptcy

In the Matter of Experimenter Publishing Co., Inc., Bankrupt

Statement of Evidence

Before Hon. Peter B. Olney, Jr., Referee

New York, April 9, 1931—3:30 o'clock, P. M.

Hearing on Motion to Expunge Notices of Claims of State of New York

Appearance

S. John Block, Esq., Attorney for the Trustee.
John J. Bennett, Esq., Attorney General, Represented by Mr. Anthony P. Ludden, Deputy.

The Referee: What is this all about?

Mr. Block: A long time has elapsed since the bar order was made and filed in this matter.

The Referee: When was the bar order entered?

Mr. Block: July 18, 1929.

The Referee: When was the expiration date?

Mr. Block: September 18, 1929.

The Referee: Is that conceded?

Mr. Ludden: Yes, sir, that is conceded.

[fol. 32] Mr. Block: And nothing has been done by the State.

The Referee: The State filed this notice when, the notice that you have moved to expunge?

Mr. Block: One March 29, 1929, and one October 17, 1929, which was filed after the bar order itself had been served and that was merely another notice.

The Referee: What has the State to say why I should not follow the decision of Referee McDonald upon the conceded facts before me?

Mr. Ludden: In the first place the State of New York claims that property of the bankrupt is taken over by the Trustee and when taken over by the Trustee was subject to a definite lien for taxes.

The Referee: What taxes?

Mr. Ludden: For the years 1917 to 1928 inclusive.

The Referee: Taxes for those years have been paid, haven't they?

Mr. Ludden: Partly, but they are never paid unless the amounts are correctly paid.

The Referee: Have not all the taxes imposed by the State in these years been paid?

Mr. Ludden: The State accepted, of course, the return of the corporation as made to them but under our tax law the State of New York, Section 219-d, upon the change of the rate or the amount by the United States Government, it is the duty of the taxpayer or the corporation to make a further return to the State of New York to conform to the [fol. 33] figures as fixed by the United States Government, and as far as the State of New York is concerned, we claim the taxes have not been paid until the entire amount, cor-

rected amount has been paid, and that the lien remains in force until that time.

The Referee: Is it conceded the amount of the net income for any year for this corporation as returned to the United States Treasury Department was changed or corrected by the Commissioner of Internal Revenue?

Mr. Ludden: I am informed so by the Tax Department of the State of New York.

The Referee: What do you contend to be the facts in that connection?

Mr. Hutchins: This matter has been pending, as far as we are concerned, for some time, since the filing of the notice of unliquidated claim for these additional taxes and since that time I have received from attorneys familiar with this matter copies of determinations of the United States Government. I also inspected the file of claims filed in this proceeding and found the Federal Government had filed claims for additional taxes covering the calendar years 1922, 1924, 1925 and 1926, I believe. In any event for certain years claims have been filed by the Federal Government and no report of this was made by the bankrupt to the State Tax Department.

The Referee: Then why didn't you file a claim in time based on those claims filed here by the United States Government?

Mr. Hutchins: I felt in view of the provisions of our tax law and in view of the fact the taxpayers are required to [fol. 34] report to us the changes and the regulations of the State Tax Department require the actual Federal audit shall be reported to the Tax Department, and in view of the fact also that the purchasing company had delivered to it all of the books, records and other data belonging to the bankrupt, that upon a request coming from our Department that there should be no difficulty or objection in their furnishing that information. The tax law also permits the taxpayer who submits such determinations to concede the final Government figures as correct or point out wherein they are erroneous and we understand there was some attempt being made to compromise the Government claim.

Mr. Ludden: I might also say the Court of Appeals of the State of New York has held that where a return has been made by the taxpayer or a tax fixed, notwithstanding

the fact the return has not been filed and the amount has not been fixed, it still is a lien on the property.

The Referee: What case is that?

Mr. Ludden: The Minor C. Keith, Inc. case, 250 N. Y., 216. The State of New York states they received no notice of the payment of dividends, no notice of the sale of the property and no notice other than the bar order?

Mr. Block: I will not concede that. You knew of the bankruptcy proceeding because you filed a claim within the six months' period.

Mr. Ludden: We did not get any notice with respect to the sale or its terms and we got no notice as to payment of dividends.

[fol. 35] The Referee: Is there anything else to be put on record?

Mr. Block: There have been dividends paid in this matter totaling eighty-five percent of the face amount of the claims filed and allowed. I offer in evidence as part of the record the agreement and supplemental agreement between the trustee and the Experimenter Publication Inc. and Mr. McKinnon, and the order of the court approving that agreement and whatever papers there are on file in the matter of the sale to the above named persons and also the sale of the radio station. Also the orders of the court with reference to those sales and also the order of the court made during September, 1929, setting forth a list of all claims filed and allowed and a list of claims filed and disputed and the several orders of the court declaring dividends in this matter and directing the payment of dividends by the trustee.

Mr. Ludden: I do not think that is relevant to the New York State claim. If I have to appeal, I do not want to print all those papers.

The Referee: Why don't you put it into a stipulation of facts?

Mr. Ludden: I would like to ask an opportunity to file our claims and the trustee if possible give us a copy of the claims of the United States Government.

The Referee: Why don't you furnish Mr. Ludden with such information as he asks without prejudice to the decision on this motion?

Mr. Block: I have no information to furnish him with.

[fol. 36] The Referee: All right, the matter is adjourned sine die so that either party may put in anything further they wish to, the understanding now being that the parties will attempt to get up a state of facts.

Mr. Block: I would like to have it adjourned for a definite date.

The Referee: All right, then I would suggest about two weeks.

Mr. Block: All right, sir.

Minutes of June 17, 1931

Re Experimenter Publishing Co., Inc., Bankrupt

Before Hon. Peter B. Olney, Jr., Referee

New York, June 17, 1931—12:30 p. m.

Adjourned hearing on motion against State of New York.
Present: The Referee, Mr. Block.

The Referee: The default of the State of New York is noted.

Mr. Block: Of course they have been present at other hearings and presented their side of the case.

[fol. 37] The Referee: It is made a part of the motion papers and it is also conceded that bar orders against the State of New York were duly filed and that these so-called notices of unliquidated claims by the State of New York were filed with the Referee subsequent to the expiration of the term limited in the bar orders. Is that correct?

Mr. Block: Yes, sir. That is the substance of it.

The Referee: On the authority of the Matter of Mutual Parlor Suite Co., 11 A. B. R., N. S. 116, decided by Referee McDonald in Brooklyn, deciding that a bar order means what it says and that, therefore, the State of New York and the Government are barred from filing a claim. That matter was confirmed upon review by Judge Inch, United States District Court, Eastern District of New York, on December 16, 1927, and I shall grant this motion *in toto*.

Mr. Block: I would like to have it noted that at one of the prior hearings the State Tax Department was repre-

sented by an Assistant Attorney General of the State and conceded all of the matters of fact set forth in the moving affidavit of Robert L. Davis were true and correct.

The Referee: You may enter an order.

Hearing closed.

[fol. 38] Minutes of June 24, 1931

Re Experimenter Pub. Co., Inc., Bankrupt

Before Hon. Peter B. Olney, Jr., Referee

New York, June 24, 1931—2 o'clock p. m.

Reopened hearing on motion against State of New York.

Present: The Referee, Mr. Halpern, Mr. Ludden, Mr. Hutchins.

Mr. Ludden: I ask to open the default taken against the State of New York on June 17, 1931, and I desire to present certain facts.

The Referee: I will grant the motion and we will proceed at once.

Charles W. Hutchins, a witness called in behalf of the State of New York, having been first duly sworn by the Referee, testified as follows:

Direct examination.

By Mr. Ludden:

Q. Where do you live?

A. 49 Lincoln street, New Rochelle.

[fol. 39] Q. What is your occupation?

A. Corporation tax examiner of bankrupts, department of taxation and finance.

The Referee: Now the Referee stated on June 17th that the notices of unliquidated claims of the State of New York were filed with the Referee subsequent to the expiration of the time of the bar orders. This is not strictly correct, the expiration date in the bar order which was served on July 18, 1929, specified sixty days, which expired September

16, 1929. As a matter of fact and as stated in the motion papers one of these notices of unliquidated claims, of which there was a series, was filed on March 25, 1929, at the same time that there was filed a claim for unpaid franchise taxes.

Mr. Halpern: We object to the taking of any further testimony at this time.

The Referee: Overruled. You may have an exception.

Q. Mr. Hutchins, you are an employee of the State Tax Commission of the State of New York?

A. I am, sir.

Q. And have you had charge of the investigation of the Experimenter Publishing Co., Inc., in bankruptcy?

A. Yes, sir.

Q. With respect to fixing the corporate franchise taxes due to the State of New York?

A. I have.

Q. Have you made efforts to obtain information and figures on which to base an account definite in order to file [fol. 40] same with the referee in bankruptcy?

Mr. Halpern: I object to that as incompetent, irrelevant and immaterial because attempts to get the figures are immaterial; it is wholly a question of whether the proofs of claim have been filed in time and anything done after the expiration of the sixty day bar order is immaterial.

The Referee: I will take the testimony.

A. Yes.

Q. Please state as briefly as possible what those efforts consisted of?

A. At the time of the filing of the notice of unliquidated claim—

By the Referee:

Q. Which one?

A. The notice of unliquidated claim of October 18, 1929.

Q. How about the one of March 28, 1929, what did you do then?

A. My recollection is that late in the summer of that year——

By Mr. Ludden:

Q. What year?

A. 1929.

By the Referee:

Q. How much later?

A. Before the expiration of the bar order and shortly before leaving on my annual vacation I learned that the Federal Government had filed claims for additional taxes levied against the bankrupt and became aware of the fact that there had been a sale of the assets, including the books of the bankrupt, and my best recollection is that I took up [fol. 41] through personal visitation with the attorneys for the successor company the necessity of submission to us of the final determinations of any levies made by the United States Treasury Department.

Q. Did you say you ascertained a proof of debt in bankruptcy by the Federal Government had been filed with the Referee?

A. Yes. Upon my return in October——

Q. How long were you away?

A. As I recall it my vacation was split that year. I took two weeks and then two weeks later, in September. I will say that we had several conferences at our office with representatives of Wise, Whitney & Parker regarding this situation. However on October 18th notice of unliquidated claim was prepared and filed and accompanied by a letter addressed to the Referee in Bankruptcy and a copy of that,—on the same day a letter was also written to the Irving Trust Company, enclosing a copy of the letter to the Referee, together with copy of the notice of unliquidated claim and also enclosing blank forms for the year 1928, for which year the bankrupt had not filed a report for the purpose of fixing the taxes for the year beginning November 1, 1928.

Q. Why didn't you do all that before the time had expired?

A. If this had been the only case I was working on at the time I probably would have. I had many other cases pending at the time.

Q. All right, go ahead.

A. Notice of unliquidated claim which had been filed in March, 1929, prior to the expiration of the bar order. The [fol. 42] letters written on October 18th addressed to the Irving Trust Company and to Wise, Whitney & Parker referred to the necessity of submission——

By Mr. Ludden:

Q. If you have them there produce them and I will offer them in evidence.

A. All right, I have here copies of the letters to the Irving Trust Company and Wise, Whitney & Parker.

Mr. Ludden: I offer these two letters in evidence as one exhibit.

Mr. Halpern: I object to them, they are not the originals.

The Referee: Overruled.

Mr. Halpern: Exception.

(Letters referred to received in evidence and marked, "State Government's Exhibit 1, June 24, 1931.")

Q. Continue.

A. On October 22, 1929, the Irving Trust Company acknowledged receipt of our letter of the 18th of October, stating same had been referred to their attorneys for their immediate attention. On November 29, 1929, having no reply from Wise, Whitney & Parker, a follow up letter was written to them and on the same date a letter was written to the Irving Trust Company, calling attention to the fact that other than their acknowledgment of our letter of October 18th, we had heard nothing further in the matter.

Mr. Ludden: I offer copy of this letter in evidence.

[fol. 43] Mr. Halpern: I make the same objection.

Referee: Overruled.

Mr. Halpern: Exception.

(Paper referred to received in evidence and marked, "State Government's Exhibit 2, June 4, 1931.")

Q. Continue.

A. On December 3, 1929, in response to our letter of November 26th, Wise, Whitney & Parker wrote our department a letter indicating thus far unsuccessful efforts to obtain the information required.

Mr. Ludden: Copy of which letter is offered in evidence.

Mr. Halpern: I make the same objection.

The Referee: Overruled.

Mr. Halpern: Exception.

(Paper referred to received in evidence and marked, "State Government's Exhibit 3, June 24, 1931.")

Q. Continue.

A. On January 28, 1930, our office received a letter from Mr. Block, attorney for the trustee, replying to our office letter of November 6, 1929, addressed to the Irving Trust Company.

Mr. Ludden: I offer this letter in evidence.
Mr. Halpern: Same objection.
The Referee: Overruled.
Mr. Halpern: Exception.

(Received in evidence and marked, "State Government's Exhibit 4, June 24, 1931.")

[fol. 44] Q. Continue.

A. On February 14, 1930, Mr. Block's letter of January 28th was replied to.

Mr. Ludden: Copy of which letter is offered in evidence.
Mr. Halpern: I make the same objection.
The Referee: Overruled.
Mr. Halpern: Exception.

(Received in evidence and marked, "State Government's Exhibit 5, June 24, 1931.")

Q. Continue.

A. Under date of February 19, 1930, following a conference which I had had at the office of Epstein & Brothers, with Mr. Brothers, attorneys for the successor company, a letter was written by Epstein & Brothers addressed to me indicating further efforts were being taken to get the figures necessary for final determination.

Mr. Ludden: I offer this letter in evidence.
Mr. Halpern: The same objection.
The Referee: Overruled.
Mr. Halpern: Exception.

(Paper referred to received in evidence and marked, "State Government's Exhibit 6, June 24, 1931.")

Q. Continue.

A. On March 14, 1930, a letter was written to our department by P. D. Diffenderfer, secretary of the successor company, with respect to supply certain data required to be submitted to the United States Government Revenue office in order that the photostats might be obtained.

[fol. 45] Mr. Ludden: I offer this letter in evidence.

Mr. Halpern: I make the same objection and I ask your Honor that I have a continuing objection and exception to all these offers.

The Referee: Very well.

(Received in evidence and marked, "State Government's Exhibit 7, June 24, 1931.")

Q. Continue.

A. Likewise copy of letter from Mr. Diffenderfer to Mr. Brothers instructing him to make these efforts.

Mr. Ludden: Copy of which letter is offered in evidence.

(Received in evidence and marked, "State Government's Exhibit 8, June 24, 1931.")

Q. Continue.

A. On March 25, 1930, Mr. Block forwarded a letter to us referring to our letter dated February 14, 1930, stating he would arrange for another meeting to discuss the law.

Mr. Ludden: I offer this letter in evidence.

(Paper referred to received in evidence and marked, "State Government's Exhibit 9, June 24, 1931.")

Q. Continue.

A. On October 15, 1930, a letter was written by our office addressed to Mr. Diffenderfer.

Mr. Ludden: Copy of which letter is offered in evidence.

(Received in evidence and marked, "State Government's [fol. 46] Exhibit 10, June 24, 1931.")

Q. Continue.

A. On April 10, 1931, after the notice of motion was served, I took the matter up in person with Mr. Diffenderfer and confirmed his statement to me that he would attempt to facilitate matters. He wrote a letter addressed to me dated April 10, 1931.

Mr. Ludden: Which letter is offered in evidence.

(Received in evidence and marked, "State Government's Exhibit 11, June 24, 1931.")

Q. Continue.

A. Likewise a similar letter dated May 12, 1931. This last correspondence indicates that this information we are seeking should be at hand within a comparatively short time.

Mr. Ludden: Which letter is offered in evidence.

(Received in evidence and marked, "State Government's Exhibit 12, June 24, 1931.")

Q. Continue.

A. Also copy of letter of June 4, 1931, written by Mr. Diffenderfer to the Commissioner of Internal Revenue, Washington, D. C., stating that they were inclosing affidavits in connection with the Experimenter Publishing Co. Inc.

Mr. Ludden: Copy of which letter is offered in evidence.

(Received in evidence and marked, "State Government's Exhibit 13, June 24, 1931.")

[fol. 47] Q. Now Mr. Hutchins, you have not received information which would enable you to make a definite and proper claim to file as proof here before the Referee as yet, have you?

A. No.

Q. When do you think you will be able to file proper proofs of claim here in this proceeding?

Mr. Halpern: That is objected to.

The Referee: He may answer. Of course that depends on when he will get the information from Washington, that is obvious.

Q. If you do not know say so?

A. I do not know.

Q. Do you think it will be within a year?

A. Some time before the determination of this proceeding.

Mr. Ludden: Will you stipulate there have been objections filed to our claim that has been filed and that they have not been brought on for hearing?

Mr. Halpern: That is conceded.

Mr. Ludden: And the distribution of the estate has not been completed?

Mr. Halpern: That is conceded.

Mr. Ludden: How much is there in the estate at the present time?

The Referee: The present balance in the hands of the trustee is $50,539.06.

By the Referee:

Q. Now will you tell me this, please. One of your taxes is this 1928 tax, as to which under the laws of the State of New York it was the duty of the Experimenter Publishing [fol. 48] Co., Inc. to have filed a return in June or July, 1929, is that correct?

A. A report for the 1928 tax was due July 1, 1928, but was not filed.

Q. That was long prior to the bankruptcy?

A. Yes, sir.

Q. You are not claiming any tax for 1929?

A. No, by reason of the fact the 1929 tax, the tax for the year beginning November 1, 1929, accrued subsequent to the time of the bankruptcy.

Q. And the tax you are claiming for is for the tax for the year 1928, which became due in November, 1928, and as to which a report should have been filed July 1, 1928?

A. That is right, sir.

Q. And no such report was filed?

A. No, sir.

Q. What remedies do the statutes of the State of New York give to the State of New York to compel the filing of such a report where it has not been done?

A. It places a penalty upon the corporation for failure to file the report.

Q. What is that penalty?

A. Not less than $5,000.

Q. Did you take any steps to enforce that penalty against the corporation before this bankruptcy?

A. No, we did not.

Q. Now, these additional franchise taxes for the years beginning November 1, 1917, and running to 1928 inclusive, that is based upon what?

A. Information obtained by me.

Q. What is it based on, the tax?

A. On amounts of net incomes over and above the amount of net income as finally determined by the United States Treasury Department.

[fol. 49] Q. How did you find out the treasury department had made any other determination?

A. Through information obtained in the bankruptcy proceedings.

Q. When was that and what did you find?

A. That the Federal Government had filed claims for two or three years.

Q. When did you examine these files, before you went away on your vacation or after?

A. I believe before I went away.

Q. Have you no way, except the method you took, of obtaining the information from Washington direct as to what their assessment was?

A. So far as I know we have none.

Q. Do you contend, Mr. Hutchins, that when you discovered the Government had filed a claim for taxes in August, 1929, that there was nothing you could do outside of what you did do by way of examination in Washington to discover what this additional tax assessment was?

A. That is correct up to the time when the changes become definitely fixed as to amount and final determination. I do not believe there is any additional tax due before that time. We were told by Mr. Block and we have been led to believe early in this matter that appeals were pending in Washington on objections prior to the bankruptcy made by the bankrupt.

Q. Yes, but the Government filed a claim in August, 1930. Now, do you mean to say that the sources of information that the Government had were sealed to the State of New York, so that you could not get that information?

A. So I understand.

[fol. 50] Q. Did you ever attempt to get such information from Washington?

A. No, not directly.

Q. So you do not know absolutely of your own knowledge that it is impossible to get it?

A. No.

Q. You state, however, that your understanding of the Federal regulations is that they would prevent you from getting it?

A. Yes, sir. May I make one correction?

Q. Yes.

A. I believe my first information as to these changes, this additional tax liability due to the United States Government arose through statements contained in Schedules of liabilities filed in the United States District Court. I then came over and found the Federal Government filed a claim here.

Q. All this information you discovered prior to September 16, 1929, didn't you, or some of it anyway?

A. Yes, sir. May I add further the schedules of liabilities were filed with respect to any tax liabilities to the State of New York and there were filed by the attorneys for the petitioning creditors and the attorney for the trustee, their names appearing on the back of the schedules.

Cross-examination.

By Mr. Halpern:

Q. Have you made any attempt to bring on for hearing any of the claims you filed in this proceeding?

A. No.

Q. If you had brought them on for hearing and you had issued a subpœna duces tecum to the Experimenter Publishing Company, Inc., requiring them to bring into this [fol. 51] court—that is to the Experimenter Publications, Inc., the successor company, requiring them to bring into this court for your examination all the books of the bankrupt that they had bought at the sale in 1929, you would have had access to these books?

Mr. Ludden: I object to that as incompetent.

The Referee: Sustained.

Q. You stated that you learned in the early part of 1929 or prior to your going on vacation that the sale of the assets including the books of the corporation, had taken place?

A. Yes.

Q. And knowing that you wrote to the Irving Trust Company on October 18th and requested them to fill out form 3-I. T and other forms for the purpose of enabling you to compute the taxes even though you knew the books had already been sold?

A. I did not request them to fill it out, I enclosed the blanks and called their attention to the necessity of having the information filed.

Q. You have taken no other legal steps to force the corporation to bring in the books of the bankrupt so you could examine them, have you?

A. No.

Q. You say that your interpretation of the New York State tax statute is that no additional tax is due until the United States Government claim for taxes — finally determined?

Mr. Ludden: I object to that as incompetent, irrelevant, and immaterial.

The Referee: He may answer.

Mr. Ludden: Exception.

A. Until the matter is finally determined.

[fol. 52] Q. Then if the claim of the United States Government for approximately $31,000 should be disallowed or reduced for any reason, you would not have a claim for taxes until that determination in this proceeding?

A. This is correct.

Q. Therefore, you do not know how soon you will have any claim for taxes or whether you will have any at all?

A. We know we have liabilities for taxes in some amount, a potential liability at least.

Q. Then as to the other ones for the year 1917 to 1928 additional taxes, if the Federal Government's claim is disallowed you have no claim for taxes?

A. Correct.

Q. And until that is finally determined you cannot state positively whether you have or have not a claim for any amount?

A. Unless the matter has been finally determined by a competent authority, if it has been settled by the Board of Tax Appeals and no review is taken, we will be in a position to file a claim. We do not know if the matter will be terminated in this proceeding or compromised or what will happen. We would like to know that.

Q. Have you made any search of the records of the Board of Tax Appeals?

A. Not as yet. I do not know if we can get that information or not.

Q. It is a court of record, is it not?
A. I am not familiar with it. I am about to look into it.

Mr. Ludden: I move the motion to expunge this unliq-
[fol. 53] uidated claim of the State of New York and the order to bar any proof in support thereof be dismissed by reason of the fact the estate has not been distributed as yet and there are sufficient funds to pay it and further the claim of the United States Government has not been heard as yet and there will be no delay in the administration of this estate by reason of the claims of the State of New York.
The Referee: I will take it under advisement.

By the Referee:

Q. Are those what you call the schedules that you examined and first discovered there was a Government claim?
A. Yes.

The Referee: Mark these schedules in evidence as my exhibit.

(Schedules referred to received in evidence and marked, "Referee's Exhibit 1, June 24, 1931.")

Hearing closed.

[fol. 54] Claimant's Exhibit 1—Letter from State Tax Department to Wise, Whitney & Parker, Dated October 18, 1929

Copy

State Tax Department, Corporation Bureau

C. W. Hutchins

Oct. 18, 1929.

Wise, Whitney & Parker, 11 William St., New York City.

Att. Mr. Wise. Re Experimenter Publishing Co., Inc., Bankrupt, #46582

Gentlemen: For your information enclosed find copy of letter forwarded this day to Referee Olney, also copy of let-

ter forwarded this day to Irving Trust Company, Trustee In Bankruptcy.

You will note the necessity of the submission *of* this Department of final determinations as made by the U. S. Treasury Department on corporate net income of the Bankrupt for any and all years from 1916 to 1928 inclusive, also of the necessity of filing a franchise tax return due July 1st, 1928.

[fol. 55] Kindly acknowledge receipt of this letter, and advise as to possibility of an early adjustment of these matters.

Very truly yours, State Tax Commission, by S. E. Bates, Asst. Deputy.

CWH:CA.
Encl.

CLAIMANT'S EXHIBIT 1—LETTER FROM STATE TAX DEPARTMENT TO IRVING TRUST CO., DATED OCT. 18, 1929

Copy.

State Tax Department, Corporation Bureau
C. W. Hutchins

Oct. 18, 1929.

Irving Trust Co., 233 Bway., New York City.

Re Experimenter Publishing Co., Inc., Bankrupt, #46582

GENTLEMEN: Enclosed find copy of letter forwarded this day to Referee Olney, together with copy of notice of unliquidated claim for unpaid franchise taxes. There is also enclosed blank Form 3IT due July 1st, 1928 for which [fol. 56] year the bankrupt above mentioned is delinquent.

In addition to the filing of the above mentioned return, it will also be necessary that there be submitted to this office all final determinations of the U. S. Treasury Department, effecting net income of this Corporation for the years 1916 to 1927 inclusive.

This matter has heretofore been discussed with Mr. Garrison as well as Mr. Wise, who we understand represents the purchaser of certain of the assets of the bankrupt in this proceeding.

Will you kindly acknowledge receipt of this letter at an early date, and notify this office as to your position in reference to the position taken by this Department in its letter to Referee Olney.

A copy of the letter forwarded to Referee Olney has also been furnished Mr. Wise.

Very truly yours, State Tax Commission, by S. E. Bates, Asst. Deputy.

CWH:CA.
Encl.

[fol. 57] CLAIMANT'S EXHIBIT 2—LETTER TO IRVING TRUST CO., DATED NOV. 26, 1929

State Gov. Ex. 2, 6/24/31

Copy

State Tax Department, Corporation Bureau

C. W. Hutchins

Nov. 26, 1929.

Irving Trust Co., 233 Bway., New York City.

Re Experimenter Publishing Co., Inc., Bankrupt, #46582

GENTLEMEN: This office wishes to call your attention to letter of Oct. 18th, 1929 and your reply thereto, of Oct. 22nd, 1929, wherein your advised that Department's letter with enclosures had been referred to your Attorneys for their immediate attention.

This office has received no further communication in this matter, and wishes to be advised at once, as to your intention with relation to Department's request for the filing at this office, of report Form 3IT due July 1st, 1928, and the submission of certain final determinations of the U. S. Treasury Department, affecting the net income of this Corporation, for the years 1916 to 1927 inclusive.

Very truly yours, State Tax Commission, by S. E. Bates, Asst. Deputy.

CWH:CA.

[fol. 58] CLAIMANT'S EXHIBIT 3—LETTER FROM WISE, WHITNEY & PARKER, DATED DEC. 3, 1929

State Gov. Ex. 3, 6/24/31

Wise, Whitney & Parker, Counselors-at-Law, 15 William Street, New York

December 3, 1929.

Department of Taxation & Finance, 220 West 40th Street, New York City.

Attention of Mr. Bates. Re Experimenter Publishing Co., Inc., Bankrupt, 46582

GENTLEMEN: We have your letter of November 26th asking for reply to your letter of October 18th. Since the writer saw you at the Department in September, we have been endeavoring to procure the information required by the Department, but without success. The files of the bankrupt turned over to our client, Experimenter Publications, Inc., do not include copies of the income tax returns filed with the United States, nor of any adjustments of these taxes with the Government.

We have been endeavoring to obtain such copies from the Department in Washington with the assistance of the at-[fol. 59] torney for the trustees. Until we have these, we are powerless to assist in this connection.

Very truly yours, Wise, Whitney & Parker.

D5. State Tax Dept. Received Dec. 3, 1929. Corporation Bureau, New York Office.

[fol. 60] CLAIMANT'S EXHIBIT 4—LETTER FROM S. JOHN BLOCK, DATED JANUARY 21, 1930

State Gov. Ex. 4, 6/24/31

Law Offices of S. John Block, 225 Broadway, New York

Telephone: Barclay 6171

January 21, 1930.

State of New York, Department of Taxation and Finance, State Tax Commission, 220 West 40th Street, New York, N. Y.

Re Experimenter Publishing Company, Inc., Bankrupt.
Attention of Mr. C. W. Hutchins, #46582

GENTLEMEN: Your letter of November 6, 1929, addressed to Irving Trust Company has been referred to me for my attention.

All the books of the bankrupt have been sold to, and are now in the possession of, Experimenter Publications, Inc., the purchaser of practically all of the assets of the bankrupt. The books are entirely out of the control of the Trustee. The Trustee is, therefore, not in a position where it can prepare and file your report Form 31T, due July 1, 1928.

Upon the legal aspect of this matter, I am of the opinion that the State is not entitled to file any claim for taxes as [fol. 61] it is barred by the order of Referee Olney, a copy of which order was duly served upon your department and upon the attorney for the State Tax Commission. The obligation to pay the tax having accrued prior to the bankruptcy, the State is barred not only by the bar order but also by the six months' statute of limitation provided in Section 57 of the Bankruptcy Act. The cases interpreting that section hold that claims of State Governments which have accrued prior to the bankruptcy are subject to the provisions of the section as are the claims of any other creditor. Do you not accept this version of the law?

With regard to your request for the submission of certain final determinations of the United States Treasury Department affecting the net income of this corporation for the years 1916 to 1927, inclusive, allow me to inform you that the claim of the United States Government, based upon these determinations, is now being contested and until the objections to the claim are finally determined the Trustee will be unable to furnish you with the information requested.

I trust that the foregoing statement will be satisfactory to you.

Very truly yours, S. John Block.

SJB/MP.

[fol. 62] State Tax Dept., Received Jan. 22, 1930. Corporation Bureau, New York Office.

CLAIMANT'S EXHIBIT 5—LETTER FROM STATE TAX DEPARTMENT TO S. JOHN BLOCK, DATED FEB. 14, 1930

State Gov. Ex. 5, 6/24/31

Copy

State Tax Department, Corporation Bureau

C. W. Hutchins

Feb. 14, 1930.

Mr. S. John Block, 225 Bway., New York City.

Re Experimenter Publishing Co., Inc.

DEAR SIR: Replying to your letter of Jan. 21st, you are advised that so far as the dictator is aware, the provisions of Section 57 of the Bankruptcy Act are not applicable to or binding upon the Sovereign.

It is our further understanding that the purpose of bar orders relative to taxes due the State, is to permit distribution with safety from personal liability and not to evade [fol. 63] or avoid such statutory obligations for the support of the Government of the State of New York.

The Department served notice in this bankruptcy proceeding of unpaid franchise tax, for the tax year beginning Nov. 1st, 1928 by filing in the office of the Referee in Bankruptcy, a so-called notice of unliquidated claim, same having been filed on or about March 29, 1929; likewise similar notice was given in the matter of Consrad Co. Inc., under date of June 11th, 1929 covering the tax years beginning Nov. 1st, 1920, 1921, 1923, 1924, 1925 and 1928.

As to the precise nature of the liability for taxes assessed under the provisions of Article 9-A of the Tax Law, you are respectfully referred to the following decisions of the Court of Appeals of this State.

"Engelhardt vs. Alvino Realty Company, Inc., 248 N. Y. 374."

"Helen V. Carey vs. Minor C. Keith, Inc., 250 N. Y. 216."

Referring to the next to the last paragraph of your letter, Department wishes to be informed as to the present status of the situation with respect to the contesting of these additional claims for taxes. Have proceedings been

taken under the provisions of the Income Tax Law or under the provisions of Section 64-A of the Bankruptcy Act?

[fol. 64] There would seem to be no reason why at this time information should not be submitted as to the determinations of the Federal Government, for if same are revised, an adjustment would be due the taxpayer under Section 219-D of the Tax Law.

Very truly yours, State Tax Commission, by S. E. Bates, Asst. Deputy.

CA.

CLAIMANT'S EXHIBIT 6—LETTER FROM EPSTEIN & BROS., DATED FEB. 19, 1930

Epstein & Brothers, Attorneys-at-law, 2 Rector Street

New York, February 19th, 1930.

Mr. Charles W. Hutchins, c/o State Tax Department, 220 West 40th Street, New York City.

DEAR MR. HUTCHINS: I am this day writing to Messrs. Olvany, Eisner & Donnelly instructing them to furnish you with such information as you may require regarding the tax claims made by the U. S. Government against the Experimenter Publishing Co., Inc. If you will phone Mr. Berliner of that office, I am certain that Mr. Berlinger will make an appointment with you for the foregoing purpose.

Very truly yours, Arthur J. Brothers.

AJB:M.

[fol. 65] CLAIMANT'S EXHIBIT 7—LETTER FROM MACKINNON-FLY PUBLICATIONS, DATED MARCH 14, 1930

Mackinnon-Fly Publications, Inc., Experimenter Publications, Inc., Novel Magazine Corporation, 381 Fourth Ave., New York

Bogardus 0900

March 14th, 1930.

State Tax Commission, 220 West 40th Street, New York, N. Y.

Attention Mr. Hutchinson

GENTLEMEN: In compliance with your request, I have written to our attorney, Mr. Arthur Brothers, of Epstein

& Brothers, #2 Rector Street, New York, requesting that he get us an affidavit from the Irving Trust Company, Trustee, for the purpose of our securing photostatic copies of the Federal Returns filed by the Experimenter Publishing Company for the years 1925, 1926 and 1927. Just as soon as Mr. Brothers secures the necessary implements to use in securing such copies, I will immediately forward our check to Washington to secure such copies.

In the meantime, if you desire any further information and I can be of any further assistance, please do not hesitate to call on me. Also, I am sure that Mr. Brothers [fol. 66] will be glad to do anything in his power to help you.

Yours very truly, P. B. Diffenderfer, Secretary.

P. B. Diffenderfer.
FC.

State Tax Dept. Received Mar. 17, 1930. Corporation Bureau, New York Office.

CLAIMANT'S EXHIBIT 8—LETTER FROM STATE TAX DEPARTMENT TO ARTHUR BROTHERS, DATED MARCH 14, 1930

March 14th, 1930.

Mr. Arthur Brothers, Epstein & Brothers, #2 Rector Street, New York, N. Y.

DEAR MR. BROTHERS: Mr. Hutchinson of the State Tax Department visited with me yesterday and tried to get information on the Federal Returns, as prepared by the Experimenter Publishing Company, for the years 1925, 1926 and 1927.

[fol. 67] I turned over to Mr. Hutchinson all available information which we had in our files and as you understand, nothing was brought to light which would be of material assistance to Mr. Hutchinson. Thereupon, Mr. Hutchinson suggested that I try to obtain photostatic copies of these returns. I told Mr. Hutchinson that I could not do this unless an affidavit to the effect that we had a right to such returns was obtained from the Irving Trust Company, trustee in bankruptcy, for the Experimenter

Publishing Company, for the purpose of obtaining such copies—same to be forwarded to Washington.

Therefore, will you please get the necessary implements from the Irving Trust Company in order that I can secure such photostatic copies of returns, as requested.

Yours very truly, P. B. D., Secretary.

P. B. Diffenderfer.
FC.

[fol. 68] CLAIMANT'S EXHIBIT 9—LETTER FROM S. JOHN BLOCK, DATED MARCH 25, 1930

Law Offices of S. John Block, 225 Broadway, New York
Telephone: Barclay 6171

March 25, 1930.

Corporation Tax Bureau, Department of Taxation and Finance, State of New York, 220 West 40th Street, New York, N. Y.

Attention of Mr. C. W. Hutchins. Re Experimenter Publishing Company, Inc., Bankrupt

GENTLEMEN: I am giving my attention to your letter in the above matter dated February 14, 1930. As soon as I shall have prepared a summary of the law which I feel will meet the arguments cited in your letter I shall communicate with you and arrange for another meeting to discuss the law pertaining to the claim of the State of New York.

Very truly yours, S. John Block, by R. H.

RH/MP.
Dictated by Mr. Halpern.

[fol. 69] CLAIMANT'S EXHIBIT 10—LETTER FROM STATE TAX DEPT. TO P. B. DIFFENDERFER

Copy

Department of Taxation and Finance, Corporation Tax Bureau
C. W. Hutchins

Oct. 15, 1930.

Mr. P. B. Diffenderfer, 381 4th Ave., New York City.

Re Experimenter Publishing Co., Inc.; also the Consrad Co. Inc. Bkpt., #46582, #46613

DEAR SIR: This office has not heard further from you since your letter of March 14th, 1930 wherein you advised that through your Attorneys, certain steps had been taken to obtain photostatic copies of Federal Returns, filed by the Experimenter Publishing Co. Inc. for the years 1925, 1926 and 1927.

Kindly advise the present status of this matter by return mail, as this Department has received a letter from the Department of Law, suggesting expedition in the settlement of this case.

Very truly yours, State Tax Commission, by S. E. Bates, Asst. Deputy.

CA.

[fol. 70] CLAIMANT'S EXHIBIT 11—LETTER FROM P. B. DIFFENDERFER, DATED APR. 10, 1931

Radio-Science Publications, Inc., 381 Fourth Avenue, New York

April 10th, 1931.

46582

Mr. Hutchinson, State Tax Department, 80 Center St., New York, N. Y.

DEAR MR. HUTCHINSON:

In compliance with your request of even date, I have requested our Vice-President and General Manager, Mr. Guy L. Harrington, to write to the Federal Income Tax Bureau, Washington, D. C., to secure photostatic copies of Federal Income Tax Returns of the Experimenter Publishing Co., Inc., 251 Fifth Avenue, New York, N. Y., for the years 1922 up to and including the year 1927, with copies of any final determinations that apply to these years.

As soon as such photostatic copies are received, I will see that they are promptly dispatched to you.

With kindest personal regards, I am,

Yours very truly, P. B. Diffenderfer.

P. B. Diffenderfer.
SR.

[fol. 71] CLAIMANT'S EXHIBIT 12—LETTER FROM P. B. DIFFENDERFER, DATED MAY 12, 1931

Radio-Science Publications, Inc., 381 Fourth Avenue, New York

May 12th, 1931.

Mr. C. W. Hutchins, Corporation Tax Bureau, 80 Center St., New York, N. Y.

DEAR MR. HUTCHINS: Confirming our conversation of even date, this is to advise you that the Treasury Department at Washington, D. C. asknowledged receipt of our letter of April 10th, wherein we requested certain photostatic copies of Federal Income Tax Returns as filed by the Experimenter Publishing Co., Inc., for the years 1922 to 1927, inclusive, and wherein they stated that it was necessary for us to forward an application over the signature of a principal officer, countersigned by the secretary under the corporate seal, together with an affidavit showing that we have acquired the Experimenter Publishing Co., Inc.

In compliance with the request of the Treasury Department's letter of April 24th, our Secretary, Mr. Byrd D. Wise, of the firm of Wise, Whitney & Parker, forwarded such application signed by Mr. Guy L. Harrington, Vice-President and General Manager, along with an affidavit as prepared by Mr. Gustav Gardner, Assistant Vice-President [fol. 72] of the Irving Trust Company, trustee in bankruptcy of the Experimenter Publishing Co., Inc., bankrupt, to the effect that we had purchased most of the assets of the above bankrupt.

Yours very truly, P. B. Diffenderfer, Comptroller.

P. B. Diffenderfer.
SR.

CLAIMANT'S EXHIBIT 13—LETTER TO COMMISSIONER OF INTERNAL REVENUE, DATED JUNE 4, 1931

June 4th, 1931.

Commissioner of Internal Revenue, Treasury Department, Washington, D. C.

File Reference: IT: R: F: G: J Y D

SIR: In compliance with your request to furnish certified affidavits in connection with the Experimenter Publish-

ing Co., Inc., adjudicated bankrupt in the U. S. District Court, Southern District of New York, (docket Number 46582), enclosed herewith, please find such affidavits.

[fol. 73] In this connection, we wish to obtain photostatic copies of the Federal Tax Returns filed by this corporation, from 1922 up to and including 1927, along with any final determinations of net income.

Please give this matter your prompt attention, as we need this information at an early date.

Yours very truly, P. B. Diffenderfer, Comptroller.

P. B. Diffenderfer.
SR.
Enc.

REFEREE'S EXHIBIT 1

This exhibit consists of the usual schedule of creditors and the amounts of their claims, executed by Experimenter Publishing Co., Inc., bankrupt, by Irving S. Manheimer, Secretary, and verified on March 8, 1929, filed in the office of the Clerk of the District Court for the Southern District of New York on March 11, 1929, of which schedules, Schedule A (1) reads as follows:

"Schedule A (1), No. —

Statement of All Creditors Who Were to be Paid in Full or to Whom Priority is Secured by Law

Claims which have priority	Amount, Dollars, cents
[fol. 74] 1. Taxes and debts due and owing the United States:	
Income Taxes Additional Assessments—1922.	12,280.84
Income Taxes Additional Assessments—1924-1925	6,008.62
Estimated maximum	18,289.46
2. Taxes due and owing to the State of —— or to any County, District or Municipality thereof	.....

3. Wages due workmen, Clerks or Servants to an amount not exceeding $300 each; earned within three months before filing the petition. See Attached Schedule of Wages	5,749.02
4. Other Debts having priority by Law	.....
Total	.....

Experimenter Publishing Company, Inc., Bankrupt, by Irving S. Manheimer, Secretary.

[fol. 75] It is stipulated that this exhibit need not be printed but may be produced by either party on the argument on the appeal herein and referred to in the briefs as if here set out at length.

Dated New York, March —, 1932.

John J. Bennett, Jr., Attorney General of the State of New York. S. John Block, Attorney for Appellants."

ORDER OF REFEREE OLNEY, DATED APRIL 10, 1929

At at court of bankruptcy held in and for the Southern District of New York, at the office of Referee Peter B. Olney, Jr., Esq., this 10th day of April, 1929.

Present: Honorable Peter B. Olney, Jr., Esq., Referee.

In Bankruptcy. No. 46582

In the Matter of EXPERIMENTER PUBLISHING CO., INC., Bankrupt

Whereas application has been made by the Trustee herein in its petition verified April 10th, 1929, annexed hereto, for the confirmation of the sale to a purchaser corporation to be organized by Bergan A. Mackinnon of 225 [fol. 76] Varick Street, New York City, in said District, of all of the property, business and franchises of the bankrupt, exclusive of certain radio stations, their licenses and appurtenances, certain lots of real estate and certain other items more specifically described in said petition, for a price in cash equivalent to the amount of all claims filed in the proceeding herein within the statutory period and

duly allowed, less the sum of $80,000, of which purchase price $23,750 in cash has been paid, as described in said petition, and $166,250 is to be paid within fifteen days from the date of the confirmation of said sale, and the balance as set forth in said petition; and

Whereas, the acceptance by the Trustee herein of the written bid of said Bergan A. Mackinnon, described in said petition, providing for the sale as aforesaid to said purchaser corporation, was made at an adjourned special meeting of creditors held on April 3, 1929 pursuant to due notice, as provided by Section 58-a (4) of the Bankruptcy Act; and

Whereas, the acceptance of said bid and the sale provided for thereunder had the unanimous approval of the creditors present or represented at said meeting;

Now, therefore, upon motion of Messrs. Root, Clark, Buckner, Howland & Ballantine and S. John Block, Esq., attorneys for the Trustee herein, it is

[fol. 77] Ordered that the acceptance of said bid and the sale provided for thereunder be and the same hereby are confirmed; and it is further

Ordered, that the Trustee herein, on receipt of the cash payment to be made within fifteen days from the date of such confirmation, complete the said sale by executing the proper instruments, transferring to said purchaser corporation all of the Trustee's right, title and interest in and to the property, business and franchises so purchased, and delivering the same to the said purchaser-corporation.

Peter B. Olney, Jr., Referee in Bankruptcy.

ORDER OF REFEREE OLNEY, DATED APRIL 10, 1929

At a court of Bankruptcy held in and for the Southern District of New York, at the office of Referee Peter B. Olney, Jr., Esq., this 10th day of April, 1929.

Present: Honorable Peter B. Olney, Jr., Esq., Referee.

In Bankruptcy. No. 46,582

In the Matter of EXPERIMENTER PUBLISHING CO., INC., Bankrupt

Whereas, application has been made by the Trustee herein in its petition verified April 10th, 1929, annexed hereto,

[fol. 78] for the confirmation of the sale to Chester W. Cuthell of 20 Pine Street, New York City, in said District, or to such corporation as he may designate, of the radio stations known as WRNY and W2XAL, and the licenses and appurtenances relating thereto, as described in said petition, for the total sum of $100,000 in cash, of which $10,000 in cash has been paid, as described in said petition, and the remaining $90,000 is to be paid within fifteen days from April 3, 1929; and

Whereas, the acceptance by the Trustee herein of the written bid of said Chester W. Cuthell, described in said petition, providing for said sale, was made at an adjourned special meeting of creditors held on April 3, 1929, pursuant to due notice as provided by Section 58-a (4) of the Bankruptcy Act; and

Whereas, the acceptance of said bid and the sale provided for thereunder had the unanimous approval of the creditors present or represented at said meeting;

Now, therefore, upon motion of Messrs. Root, Clark, Buckner, Howland & Ballantine, and S. John Block, Esq., attorneys for the Trustee herein, it is

Ordered that the acceptance of said bid and the sale provided for thereunder be and the same hereby are confirmed; and it is further

Ordered that the Trustee herein, on receipt of the balance of the cash payment provided for, complete the said [fol. 79] sale by executing the proper instruments, transferring to such purchaser or to such corporation as he may designate all of the Trustee's right, title and interest in and to the said radio stations and the licenses and appurtenances relating thereto, and delivering the same to said purchaser.

Peter B. Olney, Jr., Referee in Bankruptcy.

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

In Bankruptcy. No. 46582

In the Matter of EXPERIMENTER PUBLISHING CO., INC., Bankrupt

PETITION OF IRVING TRUST COMPANY

To the Honorable Peter B. Olney, Jr., referee in bankruptcy:

The petition of Irving Trust Company respectfully shows as follows:

I. Your petitioner is the duly qualified and acting Trustee herein.

II. A special meeting of the creditors of the bankrupt herein was held on March 28, 1929, called upon ten days' written notice, copies of which were duly mailed to the [fol. 80] creditors, and duly published in accordance with the rules of this Court, stating the purpose of said meeting to be among other things the consideration of such bids for the assets and business as a whole, or for separate parcels thereof, (exclusive in any event of certain lots of real estate), as might be received. In conjunction with said meeting, a special meeting of the creditors of The Consrad Co., Inc., of which your petitioner is likewise the Trustee in Bankruptcy, was held upon similar notice. The two bankrupt companies were operated substantially as one unit from the office of the bankrupt herein at 230 Fifth Avenue, New York City; the officers, directors and stockholders of the two companies were substantially identical. The bankrupt herein published a number of magazines and undated publications and operated certain radio stations known as WRNY and W2XAL; The Consrad Co., Inc., published a quarterly magazine called "Radio Listeners' Guide and Call Book" and had substantially no other business; said quarterly magazine was distributed by and in the name of the bankrupt herein. Your petitioner as Trustee of the bankrupt herein has a claim against The Consrad Co., Inc., believed to be in excess of $100,000; it is believed that the total of all other claims or alleged claims against The Cons-

rad Co., Inc., does not exceed two or three thousand dollars and that accordingly, substantially all of the proceeds, less administration expenses, realized by your petitioner as Trustee of The Consrad Co., Inc. from the sale of the assets of The Consrad Co., Inc. will be available for distribution [fol. 81] to the creditors of the bankrupt herein.

II. At said special meetings bids were submitted for the purchase of the properties of the two bankrupt companies as a whole (exclusive of certain lots of real estate in Hempstead, Long Island, and of certain other items) and for the radio stations and certain magazines separately. In order to give your petitioner and a creditors' committee elected at said meetings, time to consider said bids in detail, said meetings were adjourned to April 3, 1929 with the understanding that at the adjourned meetings other bids might be received and bids previously submitted might be altered.

III. At the adjourned meetings on April 3, 1929, your petitioner as Trustee, with the approval of this Court and the unanimous approval of the creditors' committee and the other creditors present or represented, accepted the following bids:

(a) The bid of Chester W. Cuthell, of 20 Pine Street, New York City, of $100,000 in cash for the said radio stations and appurtenances, said bid specifically stating that no representation or warranty was being made by your petitioner as to the survival, assignability or renewability of the licenses to operate the said stations. Said bid, a copy of which is annexed hereto and marked Exhibit "A," provided for the payment of said purchase price as follows: [fol. 82] $10,000 in cash forthwith, which has been duly paid to your petitioner, and the balance, $90,000, within fifteen days from the date of acceptance, namely April 3, 1929. The appraised value of said radio stations was $7,500 for the physical properties, the appraisers estimating the good will value at from $20,000 to $30,000 additional.

(b) The bid of Bergan A. Mackinnon of 225 Varick Street, New York City, a copy of which is annexed hereto and marked Exhibit "B," for all of the assets and business of the bankrupt companies, exclusive of said lots of real estate, of the lease of said premises at 230 Fifth Avenue,

New York City, of the said claim of your petitioner as Trustee of the bankrupt herein against The Consrad Co., Inc., of said radio stations and their appurtenances, and of certain specified alleged causes of action of your petitioner as Trustee of said companies. Said bid provided for an immediate cash payment to your petitioner as Trustee of the bankrupt herein of $23,750 (which was duly paid to your petitioner, $1,250 in addition being paid to your petitioner as Trustee of The Consrad Co., Inc. on account of the sum of $10,000 to be paid to your petitioner for the assets and business of The Consrad Co., Inc.), for a further cash payment of $166,250 within fifteen days from the date of the confirmation of the sale, plus $8,750 to be paid at the same time to your petitioner as Trustee of The Consrad Co., Inc. to complete said cash payment for the assets of said Company, and for a final cash payment or payments of a sum or [fol. 83] sums equivalent to the amount of all claims proved and allowed in the proceedings herein and in the proceedings of The Consrad Co., Inc., less the total of $200,000 to be paid as aforesaid, less the sum of $100,000 (being the amount for which the bankrupt's radio stations were sold as hereinabove described), plus the sum of $20,000 as a contribution toward administration expenses. Said bid provided, among other things, that the purchase was to be made by a corporation to be organized by Mr. Mackinnon within five days from the date of the confirmation of the sale; it provided that said corporation upon its organization should issue to your petitioner as Trustee its non-interest bearing, non-negotiable promissory note in the principal amount of $200,000 payable September 20, 1929, to be held by your petitioner as security for the final cash payment or payments to be made as described above and estimated to be approximately $200,000 or somewhat more or somewhat less, depending upon the amount of claims proved and allowed as described above; the powers of said corporation, while said note is outstanding, to be restricted in various ways more specifically described in said bid, and said corporation to be required, in the event of default of the purchase price, to reconvey the properties to your petitioner upon summary order of the Court herein. In addition to the payments to be made by said corporation, the bid provided that Mr. Mackinnon would cause said corporation to assume and agree to pay and to hold your petitioner

[fol. 84] harmless from various obligations of the bankrupt companies and of your petitioner, both as Receiver and as Trustee thereof, including obligations to distributors and advertisers for credits or refunds on billings, and to printers and others for unpaid costs of publications incurred by your petitioner in the operation of the business. The appraised value of the properties covered by Mr. Mackinnon's bid was (excluding a $20,000 valuation placed on The Consrad Co., Inc. assets) $257,207.30; the initial cash payment already made and the cash payment to be made by Mr. Mackinnon within fifteen days from the date of confirmation total $190,000. Upon completion of all payments to be made under Mr. Mackinnon's bid and Mr. Cuthell's bid, the creditors (whose allowed claims may aggregate upwards of $500,000) will have received the full amount of their claims proved and allowed in the proceedings herein, less an amount by which the administration expenses herein may exceed the sum of $20,000.

IV. Mr. Mackinnon's bid was the only bid presented at said adjourned meetings for the business and publications as a whole, and was greatly in excess of the total of the highest bids presented at said meetings of March 28, 1929 for such of the several publications separately as were bid for in that manner. No other bids for separate publications were presented at said adjourned meetings. Mr. Cuthell's bid for the radio stations was the highest bid [fol. 85] presented at said adjourned meetings and represented an increase of $40,000 over the highest bid presented at said meetings on March 28, 1929. Similarly Mr. Mackinnon's bid represented a substantial increase over the bid presented by him at said meetings on March 28, 1929 and contained other terms substantially more favorable to the creditors than those contained in his earlier bid. Your petitioner believes that said bids were the highest that could have been obtained.

Wherefore your petitioner respectfully prays for the granting of the orders hereto annexed confirming the acceptance of said bids and of the sales provided for thereunder, and authorizing your petitioner to deliver to the purchaser corporation to be organized by Mr. Mackinnon, upon receipt of the cash payment to be made within fifteen

days from the date of confirmation, and to Mr. Cuthell, upon receipt of the cash payment to be made by him within fifteen days from April 3, 1929, proper instruments transferring to them the respective properties purchased by them.

Irving Trust Company, as Trustee in Bankruptcy of Experimenter Publishing Co., Inc., by Gustav Gardner, Assistant Vice-President.

Dated New York, N. Y., April 9, 1929.

[fol. 86] *Duly sworn to by Gustav Gardner. Jurat omitted in printing.*

[fol. 87] EXHIBIT "A" TO PETITION OF IRVING TRUST COMPANY

April 3, 1929.

Irving Trust Company, as trustee in bankruptcy of Experimenter Publishing Co., Inc., 233 Broadway, New York, New York.

DEAR SIRS: The undersigned hereby agrees to pay to you, as Trustee in Bankruptcy of Experimenter Publishing Company, Inc., the sum of $100,000.00 in cash, for all of your right, title and interest in and to the Radio Broadcasting Stations known as WRNY and W2XAL, together with all equipment and appurtenances thereof, it being specifically understood that you make no representations or warranty as to survival, assignability or renewability of licenses or rights to operate.

Said payment is to be made as follows:

$10,000.00 in cash forthwith upon your acceptance of this offer, and the balance, being $90,000.00, in cash within fifteen days from the date of such acceptance.

Very truly yours, Chester W. Cuthell.

[fol. 88] April 9, 1929.

Irving Trust Company, as trustee in bankruptcy of Experimenter Publishing Co., Inc., 233 Broadway, New York, New York.

DEAR SIRS: I understand that it will be satisfactory to you, upon receipt in full of the cash payments provided for

in my written offer to you of April 3, 1929, which you have accepted, to assign and transfer either to myself or to a corporation to be designated by me, all of your right, title and interest as Trustee in and to the Radio Broadcasting Stations known as WRNY and W2XAL, together with all equipment and appurtenances thereof, it being specifically understood that you make no representations or warranty as to survival, assignability or renewability of licenses or rights to operate.

Very truly yours, Chester W. Cuthell.

[fol. 89] EXHIBIT "B" TO PETITION OF IRVING TRUST COMPANY

April 2, 1929.

Irving Trust Company, as trustee in bankruptcy of Experimenter Publishing Company, Inc., and of the Consrad Co., Inc., 233 Broadway, New York, N. Y.

DEAR SIRS: I submit to you the following offer:

1. I will cause to be organized a corporation hereinafter described (and sometimes hereinafter referred to as the purchaser corporation) and will cause said purchaser corporation to purchase from you, upon the terms and conditions hereinafter set forth, all of your right, title and interest as Trustee in Bankruptcy of Experimenter Publishing Company, Inc. and of The Consrad Co., Inc., in and to all of the assets, property and business of said Companies of whatsoever nature and wheresoever located, with the exception of—

(a) Five (5) certain lots of real property located at Hempstead, Long Island, New York.

(b) All claims which the Experimenter Publishing Company, Inc. or you as Trustee of said Company may have against The Consrad Co., Inc.

(c) All claims or causes of action which you may have against former officers, directors or stockholders of either or both of the said Companies.

[fol. 90] (d) The lease of the premises on the 18th floor of 230 Fifth Avenue, New York City.

(e) The radio station, licenses thereto with all equipment and appurtenances.

Without limiting the generality of the foregoing, it is understood that included in the assets and business which the purchaser corporation is to acquire are the publications known as "Amazing Stories", "Amazing Stories Quarterly", "Your Body Quarterly", "Science and Invention", "Radio News", "Radio Listeners' Guide and Call Book", and all undated publications and books, together with all trade names, trademarks, goodwill, copyrights, cuts, blue prints, paper, work in process, subscription lists and accounts receivable; all furniture and office equipment and other articles of personal property located in the said premises at 230 Fifth Avenue, New York City, all notes receivable, account receivable, postage deposits and other receivables, and cash on hand, including any rights, claims or causes of action which the Trustee or the bankrupt Companies or either of them may have, exclusive of the claims and causes of action hereinabove specified.

2. In consideration of the sale to the purchaser corporation of the assets, property and business covered by this offer:

(a) I will cause said purchaser corporation to pay to you a sum equal to the total of all claims of creditors which [fol. 91] shall be proved and allowed in the bankruptcy proceedings of the said Companies, less $80,000, but excluding the claim of Experimenter Publishing Company, Inc. or yourself as its trustee against The Consrad Co., Inc. The said purchase price to be paid as follows:

(1) $200,000 in cash within fifteen days from the date of the confirmation of the sale by the Court upon your delivery to the purchaser corporation at the time of such payment (hereinafter sometimes referred to as the date or time of closing) of proper bills of sale and instruments of assignment, selling, transferring and assigning to said purchaser corporation all your right, title and interest in and to the assets, property and business covered by this offer.

(2) By executing and delivering to you at the said time of closing on account of and as security for payment of the balance, the non-interest bearing, non-negotiable promis-

sory note of said purchaser corporation in the principal amount of $200,000 payable to you as Trustee September 20, 1929, at Irving Trust Company, 233 Broadway, New York City.

(3) On or before September 19, 1929, you will deliver to the said purchaser corporation a certificate of the Referee in Bankruptcy having jurisdiction of the bankrupt estates or other proper proof setting forth claims which have been proved and allowed in the respective bankruptcy proceedings and the claims which have been filed but not yet al- [fol. 92] lowed or whose status is otherwise still undetermined. Upon receipt of such certificate the purchaser corporation shall pay to you in cash on September 20, 1929, the difference between the total of all claims shown by said certificate to have been allowed, less $80,000 (also excluding the claim of Experimenter against Consrad) and the amount of cash theretofore paid on account of the purchase price and shall deliver to you its forthcoming bond in a total amount equal to the claims whose status is then still undetermined and conditioned to pay to you in cash the amount of such undetermined claims as and when such claims shall be finally allowed, said $200,000 note to be cancelled and returned to the corporation. Said bond shall be surrendered to the purchaser corporation and cancelled when all claims shall have been determined and the amount of cash payable hereunder shall have been paid by the purchaser corporation.

(b) I will cause the said purchaser corporation to assume and agree to pay and hold you harmless from and against the following:

(1) All obligations and liabilities of the Experimenter Publishing Company, Inc. and The Consrad Co., Inc., or of yourselves, as Receiver and/or Trustee of such Companies, to wholesale and retail distributors of the various publications, both dated and undated, of said Companies, including all obligations and liabilities arising out of any and all rights which said distributors or any of them may have to credits for returns already made and hereafter to [fol. 93] be made of unsold publications, whether dated or undated and whether distributed prior or subsequent to the filing of the petition in bankruptcy, and arising out of any

rights of such distributors or any of them to the return or to the payment of all or any part of the cash deposits heretofore made by them to the said Companies or either of them;

(2) All obligations and liabilities of the said Companies or either of them, or of yourselves as Receiver and/or Trustee of said Companies, to advertisers in the various publications, whether dated or undated, including all obligations and liabilities, accrued and to accrue, arising out of the right of such advertisers to receive credits in adjustment of net paid circulation;

(3) All obligations to subscribers for the several publications; and

(4) All obligations and liabilities of yourselves, as Receiver and/or Trustee in Bankruptcy, for unpaid publication costs incurred by yourselves as such Receiver and/or Trustee, including, but without limiting the generality of the foregoing, paper, manuscripts, typesetting, composition, art work, printing and shipping, heretofore or hereafter furnished to you or ordered or performed at your request, and all other costs of conducting business, to the extent that such items remain unpaid at the time of closing hereunder.

[fol. 94] (c) I will cause the said purchaser corporation to agree to hold you harmless from and against any and all liability or claim thereof, arising out of the conduct of the business by yourselves as Receiver and/or Trustee in Bankruptcy, up to the time of closing hereunder.

(d) I will cause the said purchaser corporation to execute and deliver, upon demand, all such instruments as in the opinion of your attorneys and my attorneys may be reasonably required to effectuate all undertakings herein contained, it being understood that this letter to you, upon acceptance of the terms herein contained and confirmation by the Court of sale hereunder, shall constitute a bonding agreement.

3. It is understood that upon acceptance of the offer herein contained and the sale as aforesaid, the attorneys for the undersigned or for the said purchaser corporation shall be authorized (a) to examine all proofs of claim now

or hereafter filed in the bankruptcy proceedings, and (b) to oppose at my or the said purchaser corporation's sole cost and expense, the allowance of any and all claims which in the opinion of Wise, Whitney and Parker and the Trustee should be contested in whole or in part, any contest to be instituted within two months after such claim is filed or if such claim is already filed within two months after confirmation of such hereunder.

(4) Of the cash payment to be made to you by the purchaser corporation, $10,000 shall be deemed to be payment [fol. 95] in full for all of your right, title and interest, as Trustee in Bankruptcy of the Consrad Company, Inc. in and to the "Radio Listeners' Guide and Call Book" and any other assets and property acquired by you as such Trustee.

5. I will cause the purchaser corporation to be organized as promptly as possible and not later than five (5) days from the date of the confirmation of the sale by the Court, under the laws of the State of New York or of any other State acceptable to your attorneys, and will cause provision to be made in the Certificate of Incorporation of said corporation, or otherwise in form satisfactory to your attorneys, providing among other things that until the $200,000 note provided for hereunder shall have been duly paid and cancelled, the corporation shall have no power (a) to mortgage, pledge or encumber any of its property of whatsoever description; (b) to declare or pay any dividends upon or to set apart any of its surplus or net profits or other property as a sinking fund for the redemption or otherwise for the account of any shares of its capital stock; (c) to create any other indebtedness represented by its notes or other corporate obligations, it being understood, however, that the corporation shall be entitled to secure ordinary trade and bank credit constituting current liabilities in the ordinary course of business. I further undertake that Harvey K. Fly and myself, or a corporation of which we shall own control, will acquire upon the organiza- [fol. 96] tion of said purchaser corporation, and will continue to hold so long as any of said notes remain outstanding, not less than a majority of the number of shares at any time outstanding and entitled to vote for the election of directors. I further undertake that provision shall be

made, in form satisfactory to your attorneys, providing that no management salaries or management compensation shall be payable to Mr. Fly and myself so long as said $200,000 note remains outstanding and unpaid.

6. The offer hereinabove set forth is contingent upon your continuance of the business of Experimenter Publishing Company, Inc. up to the time of closing hereunder in substantially the manner in which it is now being continued by you.

7. All questions or disputes which may arise between the parties hereunder either before or after the date of closing may be determined by the United States District Court for the Southern District of New York, or any Judge thereof, upon motion of either party to be brought on by the usual notice of motion, the parties hereby submitting themselves to the jurisdiction of the said Court for determination of al such questions or disputes.

Bergan A. Mackinnon.

The undersigned hereby makes the following amendments and supplements to this offer:

(1) The undersigned will deposit with Irving Trust Company, forthwith upon the acceptance of this offer, [fol. 97] Twenty-five Thousand Dollars in cash, as earnest money for the performance of the obligations of the undersigned, said amount to be credited against the stipulated initial payment of Two Hundred Thousand Dollars in cash. In the event of default in such cash payment, the said Twenty-five Thousand Dollars shall be retained by the Trustee as liquidated damages, and the Trustee shall have no other remedy against myself or the Purchaser Corporation.

(2) Until all payments to the Trustee provided for in this offer shall have been made, the purchaser corporation, before committing itself to payment of any salary or salaries of $10,000 per annum or more, to any individual or individuals, will report to the Trustee in writing its intention to do so, and thereupon the Trustee may object to the payment of all or any such salaries, and either party may bring on the matter for hearing and determination as set forth in foregoing paragraph 7 hereof.

(3) Until all payments to the Trustee provided for in this offer shall have been made, the purchaser corporation will not, without the prior written approval in each instance of the Trustee, make any sale or sales of any property acquired from the Trustee, except in the regular course of the purchaser corporation's ordinary business. The proceeds, if any such sales are approved, shall be applied in every case to reduction of the unpaid balance of [fol. 98] the purchase price. In the event that the Trustee refuses approval, the matter may be submitted to the Court under paragraph 7 hereof. The provisions of this paragraph shall not apply to the sale of the Radio Stations and equipment, which matter is already hereinbefore specifically covered.

(4) The undersigned agrees that in the event of any alleged default on his or the said purchaser corporation's part, the same may be submitted to the Court under foregoing paragraph 7 hereof, and unless cured pursuant to the order of the Court within such time as may be stipulated in such order, the Court may enter a summary order for the reconveyance to the Trustee of all the property of the purchaser corporation acquired from the Trustee hereunder except the Radio Station (if then resold) and any other property resold with the consent of the Trustee, and the purchaser corporation shall forthwith make such reconveyance; it being understood that on any re-sale or re-sales by the Trustee of the property so reconveyed, any surplus of the proceeds of such re-sale or re-sales, after all creditors whose claims have been proved and allowed have been paid in full, and after the payment in full of all administration expenses, including all expenses connected with obtaining such reconveyance and effecting such re-sale or re-sales, shall be paid to the purchaser corporation.

(5) The properties acquired shall be free of all liabilities except those expressly assumed hereunder, and the [fol. 99] Trustee shall cancel any and all contracts at the request of the Purchaser corporation, the Purchaser corporation, however, to hold the Trustee harmless from any liability with respect to such cancellation.

(6) The validity of no part of this agreement shall be affected by the invalidity of any other part.

(7) The attorneys for the Trustee may require that provisions to insure performance of paragraphs (2) and (3) of the foregoing amendments and supplements shall be included in the certificate of incorporation of the purchaser corporation.

April 2, 1929.

Bergan A. Mackinnon.

In United States District Court, Southern District of New York

In Bankruptcy. No. 46582

In the Matter of Experimenter Publishing Co., Inc., Bankrupt

Schedule of Referee, Dated Sept. 20, 1929

I hereby certify that Schedule I, attached hereto and made part hereof, is a complete list of claims filed with and [fol. 100] allowed by me in the above entitled proceeding, against which no objection or petition for reconsideration has been filed.

Schedule II, attached hereto and made part hereof, is a complete list of claims filed with and allowed by me in the above entitled proceeding against which objections or petitions for reconsideration have been filed said objections or petitions not having been adjudicated or which have yet to be liquidated.

Schedule III, attached hereto and made part hereof, is a complete list of claims filed with and allowed by me against which objections or petitions for reconsideration have been filed, said claims having since been amended, reduced by order after hearing or by stipulation, the amounts indicated being the sum finally arrived at as being correct.

Peter B. Olney, Jr., Referee.

Dated New York, September 20th, 1929.

"Schedule I consists of four pages enumerating 87 creditors whose claims total $383,528.30.

"Schedule II consists of two pages enumerating 76 creditors whose claims total $165,983.78.

"Schedule III consists of one page enumerating 8 creditors whose claims total $20,218.02.

[fol. 101] "It is hereby stipulated and agreed that this exhibit need not be printed. Either party to this appeal may produce and submit to the Court at the time of argument of the appeal the original of said certificate and the schedules annexed thereto may refer to said certificate and schedules in the briefs as if they were here set out at length."

In United States District Court, Southern District of New York

In Bankruptcy

In the Matter of Experimenter Publishing Co., Inc., Bankrupt

Referee's Decision

The notice of unliquidated claim of franchise tax for year beginning November 1, 1928, filed by the State of New York on March 29, 1929, was concededly filed in time. The Bankruptcy Act contemplates the filing of unliquidated claims and the process for their liquidation in such manner as the court shall direct and thereafter for their proof and allowance against the bankrupt estate. Section 63-b. Therefore, in my opinion, the motion as to this notice must be denied.

[fol. 102] The second notice filed October 20, 1929, more than six months after adjudication and over a month after September 16, 1929, the date fixed by the bar order served on the State of New York, was also a notice of unliquidated claim. In addition to being a notice of unliquidated claim for franchise tax for year beginning November 1, 1928, it was also a notice of unliquidated claims for additional franchise taxes for years beginning November 1, 1917 to 1928, inclusive. As to this notice, in my opinion, the motion should be granted on the authority of Re Mutual Parlor Suite Co., 11 A. B. R., N. S. 116; holding that a claim for taxes cannot be filed after the expiration of the bar order date. The State has only itself to blame for the situation it finds itself in as the record indicates that facts

were within its knowledge upon which it could have filed this claim prior to September 16, 1929, the date fixed in the bar order. S. M. 13 and 14.

Settle order on notice.

Dated New York, August 20, 1931.

Peter B. Olney, Jr., Referee.

[fol. 103] In United States District Court

[Title omitted]

Petition for Review of Referee's Order and Judgment

To Hon. Peter B. Olney, Jr., referee in bankruptcy:

Your petitioner herein, the Department of Taxation and Finance of the State of New York, respectfully shows:

1st. That during the course of the proceeding, the trustee in bankruptcy obtained and served on the petitioner, an order of this Court directing that all claims of the State of New York for taxes be filed on or before September 16, 1929.

2nd. That notice of unliquidated claim of franchise taxes for the year beginning November 1, 1928, was filed with this Court by the petitioner herein on March 29, 1929.

3rd. That a further and additional notice of unliquidated claim of the State of New York for the tax year beginning November 1, 1928 and also for additional franchise taxes as imposed under Section 219-D of Article 9-A of the Tax Law for tax years beginning November 1, 1917 to November 1, 1928, inclusive, was filed with this Court by the petitioner on October 20, 1929.

[fol. 104] 4th. That thereafter, the trustee of the bankrupt made a motion before the Referee herein to strike from the files of the Referee in the above-entitled matter the two (2) aforesaid notices for taxes; and to cancel and expunge said notices and directing said trustee to disregard such notices or any claims filed in support thereof.

5th. That said motion came on before the Referee and evidence was taken before him; and he has made his decision determining as follows:

1. That the notice of unliquidated claim of franchise tax for the year beginning November 1, 1928 filed on March 29, 1929 was filed in due time; and denied the motion of the trustee with respect thereto.

2. That the said notice of unliquidated claim for the tax year beginning November 1, 1928 and for additional franchise taxes for tax years beginning November 1, 1917, to November 1, 1928, inclusive, filed on October 20, 1929, over a month after September 16, 1929, the date fixed by the bar order aforesaid; and with respect to this notice, the Referee granted the motion of the trustee, as shown in his opinion, dated and filed August 20, 1931.

6th. That the said decision was contrary to the evidence and contrary to the law.

7th. That subsequently and on or about the 2nd day of September, 1931, an order was made and entered, giving force and effect to the said decision and carrying out the provisions thereof.

[fol. 105] Wherefore your petitioner feeling aggrieved because of such order, prays that the same may be reviewed as provided for in the Bankruptcy Law and General Order No. 27.

Department of Taxation & Finance of the State of New York, Office & P. O. Address 80 Center Street, New York, N. Y., by John J. Bennett, Jr., Attorney-General of the State of New York. Anthony P. Ludden, of Counsel.

Duly sworn to by Charles W. Hutchins. Jurat omitted in printing.

[fol. 106] In United States District Court

[Title omitted]

Referee's Certificate on Petition for Review

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

I, Peter B. Olney, Jr., the Referee herein, do hereby pursuant to General Order XXVII certify as follows:

The question certified for review is whether I erred in making my order dated September 2, 1931, sought to be

reviewed, in so far as I granted trustee's motion to expunge a notice of unliquidated claim for taxes filed by the State of New York on October 20th, 1929, and to direct the trustee to disregard said notice. The motion was granted in this respect, because said notice was filed after the expiration of the date fixed for filing any claim by the State of New York by a so-called bar order, duly served on the State of New York, October 20th, 1929, the date when said notice was filed was also more than six months after the date of adjudication (Bankruptcy Act, Sec. 57N).

[fol. 107] There is submitted herewith the notice of motion dated March 30th, 1931, the affidavit of Robert L. Smith verified March 30th, 1931 annexed to said notice of motion and the exhibits thereto annexed; the stenographic minutes of the proceedings before me, Referee's memorandum of opinion dated August 20th, 1931, the said order sought to be reviewed dated September 2nd, 1931, and the petition to review verified September 17th, 1931.

Dated New York, September 23rd, 1931.

Respectfully submitted,

Peter B. Olney, Jr. (SGN), Referee.

The motion for hearing hereon should be brought before the Judge sitting in Bankruptcy on Wednesday, September 30, 1931.

Peter B. Olney, Jr. (SGN), Referee.

[fol. 108] In United States District Court

[Title omitted]

Notice of Motion on Petition for Review

Sir: Please take notice that the petition of the Department of Taxation and Finance of the State of New York for review of the decision and order of the Hon. Peter B. Olney, Jr., Referee, dated September 2nd, 1931, will be brought on for hearing at a Term of this Court, before the Judge then presiding and hearing motions in bankruptcy, at the Post-Office Building, in the Borough of Manhattan, City and State of New York on the 30th day of September, 1931, at 10:30 A. M., or as soon thereafter as counsel may

be heard, and that at the said time and place, the undersigned will move for the modification of the aforesaid order to permit the Department of Taxation and Finance of the State of New York to file notice of an unliquidated claim for franchise taxes due from the above-named bankrupt for the tax year beginning November 1, 1928, and also notice of an unliquidated claim for additional franchise taxes, as imposed by Section 219 d Article 9 of the [fol. 109] Tax Law of the State of New York for the tax years beginning November 1, 1917 to November 1, 1928, inclusive, together with interest, and that said tax claims be reinstated as legal and valid claims in the above proceeding, and that the State of New York be given an opportunity to present evidence and proof in support of its claims herein.

Dated New York, N. Y., September 25th, 1931.

Yours, etc., John J. Bennett, Jr., Attorney-General of the State of New York, Attorney for the Dept. of Taxation and Finance of the State of New York. Office & P. O. address: Capitol, Albany, N. Y., New York City Bureau, 80 Centre Street.

To S. John Block and Root, Clark & Buckner, Esqs., Attorneys for Trustee, 225 Broadway, New York City.

[fol. 110] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

In the Matter of EXPERIMENTER PUBLISHING CO., INC., Bankrupt

In Bankruptcy

OPINION DISMISSING PETITION TO REVIEW

F. J. COLEMAN, J.:

Petition to review order of referee expunging claim for New York State franchise tax. The adjudication in bankruptcy took place March 6, 1929 and on July 18, 1929, a tax bar order was duly served requiring the State to file its proof of tax claims within sixty days which expired on September 16, 1929. Immediately after the adjudication the State had

filed two notices of claims and on October 20th more than a month after the expiration of the tax bar period, it filed a third notice of claim for an unliquidated amount. The trustee moved to expunge one of the notices which was timely filed and the one which was filed after the expiration of the tax bar period. The referee granted the motion as to the latter and denied it as to the former. The State now presents this petition to review the expunging of the one notice.

The notice of claim was filed more than a month after the expiration of the tax bar period and for that reason must be [fol. 111] expunged. The State had made no application to open its default and for leave to file a claim after the time provided by the bar order. It is impossible to determine upon the papers before me whether such application should be granted when it is made. Certainly the State has been extremely dilatory and remiss in regard to this matter. That may not in itself be sufficient to deprive it of the right to share in the undistributed assets because it does not sufficiently appear how such conduct may have prejudiced others. 85% of the assets have already been disbursed, but there still remains approximately $50,000. To permit this sum to be tied up for an indefinite period in the future because of an unliquidated claim by the State which the latter is doing nothing to have determined would be a gross injustice to the creditors who unquestionably at this time could make good use of their money. Judging by the State's conduct in the past in this matter, if the claim is not expunged the fund will remain in the Court for years to come.

The order of the referee is, therefore, affirmed and the petition dismissed.

Frank J. Coleman, U. S. D. J.

November 19, 1931.

[fol. 112] In United States District Court

[Titled omitted]

Petition for Appeal and Order Allowing Same

The People of the State of New York, claimant, against the above-named bankrupt, considering itself aggrieved by

the order dated December 4, 1931 and entered in the office of the Clerk of this Court on the 9th day of December, 1931, which said order confirmed an order of Hon. Peter B. Olney, Jr., referee herein, dated September 2, 1931, expunging certain tax claims of the State of New York, and which said order of this Court further dismissed a petition for review filed herein on September 18, 1931, do hereby appeal to the United States Circuit Court of Appeals, in and for the Second Circuit, from said order of this Court and from each and every part thereof as well as the whole thereof, for the reasons specified in the assignment of errors filed herein and herewith, and all other errors that may have been made, [fol. 113] and the said the People of the State of New York hereby pray that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which such order was made, duly authenticated, may be sent to the said United States Circuit Court of Appeals for the Second Circuit, and that the said order of confirmance be reversed and the Referee in bankruptcy herein ordered to receive and pass upon the tax claims of the State of New York as filed by said claimant, and for such other and further relief as to the Court may seem just and proper.

Dated New York, N. Y., December 14th, 1931.

John J. Bennett, Jr., Attorney-General of the State of New York, Solicitor for Claimant, The People of the State of New York. Office & P. O. address: Capitol, Albany, N. Y.

Allowance of Appeal

And now, to wit, this 14th day of December, A. D. 1931, upon reading and considering the foregoing petition, it is, upon motion of John J. Bennett, Jr., attorney for appellant,

Ordered by the Court that the foregoing appeal be and hereby is allowed, and the Trustee of said bankrupt, by S. [fol. 114] John Block, Esq., its attorney, waiving the giving of a bond for costs by appellant, no order as to bond is made.

Dated N. Y., Dec. 15, 1931.

Frank J. Coleman, U. S. D. J.

In United States District Court

Stipulation Waiving Bond

It is hereby stipulated and agreed that the Trustee in Bankruptcy herein waives the giving of a bond for costs by the People of the State of New York in connection with the appeal to the United States Circuit Court of Appeals for the Second Circuit from the order dated December 4, 1931, expunging a notice of unliquidated claim of the State of New York for taxes.

Dated December 15, 1931.

Irving Trust Company, Trustee in Bankruptcy, by S. John Block, Attorney.

[fol. 115] Citation, in usual form, omitted in printing.

[fol. 116] In United States District Court

[Title omitted]

Stipulation and Order Extending Time

It is hereby stipulated and consented that the time of the appellants, the People of the State of New York, to docket the case and file the record herein with the Clerk of the United States Circuit Court of Appeals for the Second Circuit be enlarged and the time extended for thirty days, to and including the 15th day of March, 1932, and [fol. 117] that an order may be entered hereon without notice.

Dated January 19, 1932.

John J. Bennett, Jr., Attorney-General of the State of New York, Attorney for the People of the State of New York, Appellant. S. John Block, Attorney for Trustee-Respondent.

So ordered, Jan. 20, 1931.

John C. Knox, U. S. D. J.

IN UNITED STATES DISTRICT COURT

STIPULATION AS TO RECORD

It is hereby stipulated that the foregoing is a true and complete transcript of the record of the United States District Court for the Southern District of New York in the matter involved in this appeal.

Dated New York, March —, 1932.

John J. Bennett, Jr., Attorney-General of the State of New York, Attorney for State-Appellant. S. John Block, Attorney for Trustee-Appellee.

[fol. 118] IN UNITED STATES DISTRICT COURT

ORDER FILING TRANSCRIPT

On the consent of the attorneys for the respective parties the foregoing printed record is hereby ordered filed for the purpose of certifying a record on appeal.

Dated New York, N. Y., March —, 1932.

F. J. Coleman, United States District Judge.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 119] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1931

No. 404

Argued May 13, 1932. Decided May 23, 1932

In the Matter of EXPERIMENTER PUBLISHING CO., INC., Bankrupt; THE PEOPLE OF THE STATE OF NEW YORK, Appellant; IRVING TRUST COMPANY, as Trustee in Bankruptcy, Appellee

Appeal from the District Court of the United States for the Southern District of New York

Before Manton, L. Hand, and Augustus N. Hand, Circuit Judges

The order appealed from expunged a notice of unliquidated claim for additional franchise taxes due to the state of New York from the bankrupt for the tax years

beginning November 1, 1917 to 1928, inclusive. The People of the State of New York appeal. Order affirmed.

S. John Block and Root, Clark & Buckner, all of New York City (S. John Block and Robert Halpern, both of New York City, of counsel), for Irving Trust Co., trustee.

John J. Bennett, Jr., Atty. Gen. (Robert P. Beyer, Deputy Asst. Atty. Gen., of counsel), for appellee.

OPINION

Per CURIAM:

The referee's order expunging the claim filed by the people of the state of New York against the collector of internal revenue, was affirmed by the District Court. The order entered expunged the record of an unliquidated claim for additional franchise taxes due to the state of New York from the bankrupt for the tax years beginning November 1, 1917 to 1928, inclusive. The reason therefor was that the appellant did not file its claim within the time allowed by the tax bar order. We have heretofore held that orders such as that appealed from had binding effect upon sovereigns and must be complied with. Matter of Morgenstern & Co., Bankrupt, 57 F. (2d) 163 decided April 4, 1932 (C. C. A. 2d Cir.); In re Anderson, 279 F. 525 (C. C. A. 2). Upon the authority of these cases, the order appealed from is affirmed, but without prejudice to an application by the people of the state of New York presenting an actual claim which can be audited and showing lawful reasons why it should be paid, at which time the trustee may contest the right to payment.

Order affirmed.

[fol. 120] IN UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

In the Matter of EXPERIMENTER PUBLISHING CO., INC., Bankrupt; People of the State of New York, Appellant

DECREE—Filed May 31, 1932

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be, and it hereby is, affirmed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 121] [File endorsement omitted.]

[fol. 122] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 123] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 17, 1932

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 37,001. U. S. Circuit Court of Appeals, Second Circuit. Term No. 304. The People of the State of New York, petitioners, vs. Irving Trust Company, as trustee in bankruptcy of Experimenter Publishing Co., Inc., bankrupt. Petition for a writ of certiorari and exhibit thereto. Filed August 17, 1932. File No. 37,001.